PETITION FOR WRIT OF CERTIORARI

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(1)

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No.

In the Supreme Court of the United States

THE COMMISSION ON ETHICS
OF THE STATE OF NEVADA,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the Nevada Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The question presented is:

Whether the First Amendment subjects state restrictions on voting by elected officials to (i) strict scrutiny, as held by the Nevada Supreme Court and the Fifth Circuit, (ii) the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), for government-employee speech, as held by the First, Second, and Ninth Circuits, or (iii) rational-basis review, as held by the Seventh and Eighth Circuits.

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Cases—Continued: **Page(s)**

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Office of Legislative Research, Conn. Gen. Assembly, *Voting Restrictions in State Ethics Codes* (Research Rep. No. 2000-R-0155, Feb. 2000), http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0155.htm 25

Orentlicher, David, *Conflicts of Interest and The Constitution*, 59 Wash. & Lee L. Rev. 713 (2002) 24

OPINIONS BELOW

The en banc opinion of the Nevada Supreme Court (App., *infra*, 1a-39a) is reported at 236 P.3d 616. The opinion of the First Judicial District Court of Nevada (App., *infra*, 40a-95a), and the opinion of the Commission on Ethics of the State of Nevada (App., *infra*, 96a-112a) are unreported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on July 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech."

Section 281A.420 of the 2007 Nevada Revised Statutes ("Nev. Rev. Stat.") provides in pertinent part that:

> a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by * * * [h]is commitment in a private capacity to the interests of others.
>
> * * * * *
>
> As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:

(a) Who is a member of [the public officer's] household;

(b) Who is related to [the public officer] by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs [the public officer] or a member of his household;

(d) With whom [the public officer] has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

Nev. Rev. Stat. § 281A.420(2), (8)(a) (2007).

STATEMENT

In a divided decision, the Nevada Supreme Court invalidated a content-neutral recusal provision governing elected officials' voting by subjecting it to the most rigorous First Amendment standard of review—strict scrutiny. That holding is incorrect and squarely conflicts with the decisions of other appellate courts that apply either the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), or rational-basis review. Indeed, the decision below creates the intolerable situation where state and federal courts in Nevada are governed by different standards.

The Nevada Supreme Court's decision calls into question a century of common-law recusal restrictions and casts doubt on the validity of widely adopted recusal statutes. The decision exposes other

states' recusal schemes to legal challenge and invites litigation questioning a host of other common restrictions on voting by local elected public officials, ranging from states removing subjects from local control to federal spending programs that provide incentives for municipalities to adopt certain programs. Because the decision below misapplies bedrock First Amendment principles and deepens an entrenched, three-way split among appellate courts, this Court's review is warranted.

1. The Nevada Legislature enacted the Ethics in Government Law (the "Law") to ensure that the State's public offices are "held for the sole benefit of the people" and "[t]o enhance the people's faith in the integrity and impartiality of public officers and employees." Nev. Rev. Stat. § 281A.020(1), (2)(b) (2009). To that end, the Law establishes recusal requirements mandating that a public official "avoid conflicts between [his] private interests * * * and those of the general public whom the public officer * * * serves." Nev. Rev. Stat § 281A.020(1)(b) (2009). The law includes a provision prohibiting various "public officers," including local legislators,[1] from voting on matters on which their "commitment in a private capacity to the interests of others" would "materially affect[]" the "independence of judgment of a reasonable person in [the public officer's] situation."

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[1] See Nev. Rev. Stat. § 281A.160 (2009). Because the Nevada Constitution provides that the Legislature is the sole judge of its conduct, the Law does not govern the conduct of state legislators. See Nev. Const. art. 4, § 6.

Nev. Rev. Stat. § 281A.420(2)(c) (2007).[2] The Law defines those disqualifying "commitment[s]" as those involving: (a) "member[s] of [the public officer's] household"; (b) relatives by "blood, adoption, or marriage"; (c) employers of the public officer or a member of the officer's household; (d) persons with whom the public officer "has a substantial and continuing business relationship"; and (e) "any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." Nev. Rev. Stat. § 281A.420(8)(a)-(e) (2007).

Nevada's Ethics in Government Law is administered and enforced by the State's Commission on Ethics. See generally Nev. Rev. Stat. § 281A.200 (2009). The Legislature structured the eight-member Commission to provide non-partisan, expert enforcement of the Law. See, *e.g.*, Nev. Rev. Stat. § 281A.200(2) (2009) (requiring "at least two" members to be "former public officers" and "at least one" member to be an actively-licensed attorney); Nev. Rev. Stat. § 281A.200(2)–(3) (2009) (dividing power to appoint members equally between the Nevada Legislative Commission and the Governor);

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[2] At the time of relevant events, the provision of the Ethics in Government Law was codified at Nev. Rev. Stat. § 281.501 (2006). The provision was recodified without substantive change the following year at Nev. Rev. Stat. § 281A.420 (2007). In 2009, the provision was amended again to require recusal only in "clear cases," but the Nevada Supreme Court did not believe that change cured the perceived overbreadth of the recusal statute. See App., *infra*, 2a n.2. Nor did the change affect the standard of review applied by the court to the recusal statute.

Nev. Rev. Stat. § 281A.200(4) (2009) (prohibiting "more than four members" of the Commission from being "members of the same political party"); Nev. Rev. Stat. § 281A.200(5) (2009) (imposing specified prohibitions on the members' outside activities). The Law grants the Commission authority to "investigate and take appropriate action regarding an alleged violation" of the Ethics in Government Law, Nev. Rev. Stat. § 281A.280(1) (2009), including the imposition of civil penalties for willful violations, Nev. Rev. Stat. § 281A.480(1)–(3) (2009). The Commission is also empowered to render, upon request, binding advisory opinions that "interpret[] the statutory ethical standards and apply[] the standards to a given set of facts and circumstances." Nev. Rev. Stat. § 281A.440(1)–(2) (2009).

2. Respondent Michael A. Carrigan is an elected member of the City Council of Sparks, Nevada, an incorporated subdivision of the State. See generally Nev. Const. art. 8 § 8. In early 2005, a developer submitted an application for a hotel/casino project known as the "Lazy 8" to the Sparks City Council for required approval. App., *infra*, 3a. The developer retained as a "consultant" Carlos Vasquez, a "longtime professional and personal friend" of Carrigan's who had served as Carrigan's campaign manager "[d]uring each of his election campaigns," including his then-pending effort to be reelected to the City Council. *Ibid.* Vasquez's consulting firm also provided services to Carrigan's campaign at cost. App., *infra*, 44a, 88a, 105a.

The Lazy 8 project came before the Sparks City Council for tentative approval in August 2006. Carrigan was aware that his relationship with

Vasquez was potentially disqualifying under the Ethics in Government Law. He was also "aware that he could have asked * * * for an advisory opinion" from the Commission on whether his relationship with Vasquez required abstention, App., *infra*, 100a. Carrigan instead sought the advice of the Sparks City Attorney, who told him that his obligations under the Law could be discharged by publicly disclosing the relationship before voting on the Lazy 8 matter. *Id.* at 4a. After making the suggested disclosure, Carrigan voted to approve the Lazy 8 project. The measure failed by a single vote. *Id.* at 99a.

3. The Commission received several complaints that Carrigan had violated the Ethics in Government Law by voting on the Lazy 8 matter. In October 2007, after a hearing at which both Carrigan and Vasquez testified, App., *infra*, 97a, the Commission issued a written opinion "censuring Carrigan for * * * failing to abstain from voting on the Lazy 8 matter," *Id.* at 4a. The Commission noted that: Vasquez was Carrigan's campaign manager at the time of the Lazy 8 vote; Vasquez and his company had provided services to Carrigan's three campaigns at cost; Carrigan considered Vasquez's assistance "instrumental" to Carrigan's three successful campaigns; and Carrigan, by his own admission, confided in Vasquez "on matters where he would not confide in his own sibling." *Id.* at 105a.

The Commission concluded that "a reasonable person would undoubtedly have such strong loyalties to [his] close friend, confidant and campaign manager as to materially affect [that] person's independence of judgment." App., *infra*, 111a. The Commission determined that the "sum total of [Carrigan and

Vasquez's] commitment and relationship equates to a 'substantially similar' relationship to those enumerated under [Nev. Rev. Stat. § 281A.420(8)(a)-(d)]," including a family relationship and a "substantial and continuing business relationship." *Id.* at 105a-106a. The Commission thus unanimously concluded that Carrigan had violated Nev. Rev. Stat. § 281A.420(2)(c) "by not abstaining from voting on the Lazy 8 matter." *Id.* at 111a. But the Commission determined that "Carrigan's violation was not willful," and so imposed no civil penalty besides censure. *Id* at 112a.[3]

4. The First Judicial District Court denied Carrigan's petition for judicial review and affirmed the Commission's decision. App., *infra*, 40a-95a. The court held that Nev. Rev. Stat. §§ 281A.420(2) and (8)(e) (2007) "are facially constitutional under the *Pickering* balancing test" and constitutional as applied to Carrigan. *Id.* at 63a. Under the *Pickering* test, "the Court must weigh the interests of public officers and employees in exercising their First Amendment rights against the state's vital interest in 'promot[ing] efficiency and integrity in the discharge of official duties.'" *Id.* at 60a (quoting *Connick* v. *Myers*, 461 U.S. 138, 150-51 (1983)). The court reasoned that "the free speech and associational rights of public officers * * * are not absolute," *id.* at

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[3] The Commission concluded that two other ethics complaints against Carrigan, alleging that he had "secured or granted unwarranted privileges" in violation of Nev. Rev. Stat. § 281.481(2), and that he had voted on a matter in which he had an undisclosed pecuniary interest, in violation of Nev. Rev. Stat. § 281.501(4), were not well founded. App., *infra*, 106a-109a.

58a, and that the state's "vital" "interest in securing the efficient, effective and ethical performance of governmental functions outweighs any interest that a public officer may have in voting upon a matter in which he has a disqualifying conflict of interest," *id.* at 61a-62a.[4] The court also rejected Carrigan's argument that the Ethics in Government Law was unconstitutionally overbroad and vague. *Id.* at 70a, 81a.

5. A divided Nevada Supreme Court reversed, holding Nev. Rev. Stat. § 281A.420(8)(e) (2007) facially unconstitutional. App., *infra*, 1a-17a. The majority observed that "[b]ecause voting is a core legislative function, it follows that voting serves an important role in political speech." *Id.* at 11a. The majority thus concluded that "voting by an elected public officer on public issues is protected speech under the First Amendment." *Ibid.* The majority then held that the interest balancing required under *Pickering* was inappropriate because an elected public officer's "relationship with the state differs from that of most public employees." *Id.* at 12a. An elected officer's "'employer' is the public itself," the majority reasoned, "at least in the practical sense, with the power to hire and fire," and an elected officer is someone "about whom the public is obliged to inform itself." *Ibid.* (quoting *Jenevein* v. *Willing*, 493 F.3d 551, 557 (5th Cir. 2007)).

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[4] The district court also rejected Carrigan's arguments that the Commission's decision violated Nevada's Administrative Procedure Act. App., *infra*, 54a-56a. Those conclusions are not at issue here.

Having rejected the *Pickering* framework, the majority concluded that "[a] strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues." App., *infra*, 11a; see also *id.* at 13a (quoting *Citizens United* v. *FEC*, 130 S. Ct. 876, 898 (2010), for the proposition that "[l]aws that burden political speech are subject to strict scrutiny").

The majority acknowledged that the recusal requirement "furthers a compelling state interest" by "promoting the integrity and impartiality of public officers." App., *infra*, 16a. Nonetheless, the majority declared that subsection 8(e), which requires recusal when a person has a "commitment or relationship that is substantially similar" to one of the relationships explicitly enumerated in Nev. Rev. Stat. § 281A.420(8)(a)-(d), "is not narrowly tailored" because it "does not inform or guide public officers as to what relationships require recusal." *Id.* at 17a. The majority thus concluded that the recusal requirement "is substantially overbroad, sweeps within its control a vast amount of protected speech, and violates the First Amendment." *Ibid.*

6. Justice Pickering dissented. She acknowledged "the communicative element in a public official's vote." App., *infra*, 23a (citing *Spallone* v. *United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting)). Justice Pickering observed, however, that the recusal requirement's "target is conduct—acts of governance—not personal, expressive speech." *Id.* at 26a. Noting decisions of the First and Eighth Circuits, Justice Pickering concluded that the proper standard of review for a "content-neutral" (App., *infra*, 23a) "law limiting an elected official's ability to

vote on matters as to which he has an actual or apparent conflict of interest" is the *Pickering* balancing test, rational-basis review, or "at most" intermediate scrutiny. *Id.* at 24a-27a (discussing *Mullin* v. *Town of Fairhaven*, 284 F.3d 31 (1st Cir. 2002), and *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997)). She rejected the majority's conclusion that *Pickering* was inapplicable to city council members who stand for election, noting that the Seventh Circuit has applied *Pickering* to elected officials. *Id.* at 25a (citing *Siefert* v. *Alexander*, 608 F.3d 974 (7th Cir. 2009), reh'g en banc denied, 2010 U.S. App. LEXIS 18163 (7th Cir. Aug. 31, 2010)).

Justice Pickering also concluded that the "substantially similar" language of the recusal statute was not overbroad. App., *infra*, 33a-39a. She noted that the words of the provision are "not free-standing," but are to be read in light of the other relationships explicitly enumerated in the provision. *Id.* at 37a. Furthermore, the provision was consistent with "the long common law history disqualifying local officials from voting on matters as to which they have conflicts of interest." *Id.* at 38a. Finally, Justice Pickering warned that "applying First Amendment strict scrutiny * * * to invalidate state conflicts-of-interest laws that govern local government officials who vote is a mistake that * * * opens the door to much litigation and little good." *Id.* at 39a.

REASONS FOR GRANTING THE WRIT

I. THE NEVADA SUPREME COURT'S DECISION DEEPENS A THREE-WAY SPLIT OVER WHETHER AND HOW THE FIRST AMENDMENT APPLIES TO REGULATION OF VOTING BY ELECTED PUBLIC OFFICIALS

This Court has long recognized that *speech* by elected officials qualifies for First Amendment protection, *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966), but it has never decided how, if at all, the First Amendment relates to *voting*. See *Spallone* v. *United States*, 493 U.S. 265, 274 (1990) (declining to reach the issue); see also *Doe* v. *Reed*, 130 S. Ct. 2811, 2833 (2010) (Scalia, J., concurring in judgment) ("Plaintiffs point to no precedent from the Court holding that legislating is protected by the First Amendment."). Although the four Justices who reached the question in *Spallone* concluded that "the act of publicly voting on legislation * * * is quintessentially one of governance" rather than speech, 493 U.S. at 302 n.12 (Brennan, J., dissenting), lower courts have splintered over whether public officials' votes amount to protected speech and, if so, which standard of review applies to regulations on official voting.

Along with the Fifth Circuit, the Nevada Supreme Court now holds that a "strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues." App., *infra*, 11a. That rigorous standard of scrutiny renders recusal statutes "presumptively invalid," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992), and statutes would only "rarely" survive that test. *Burson* v. *Freeman*, 504 U.S. 191, 200 (1992).

In contrast, the First, Second, and Ninth Circuits evaluate restrictions on voting under the intermediate standard of review applicable to speech by government employees. Finally, the Seventh and Eighth Circuits—echoing Justices Brennan and Scalia—reject equating speech to voting and hold that restrictions affecting voting are subject to rational-basis review.

A. The Fifth Circuit And The Nevada Supreme Court Apply Strict Scrutiny To Restrictions On Voting By Elected Public Officials

In the opinion below, the Nevada Supreme Court explicitly joined the Fifth Circuit in applying strict-scrutiny review to laws regulating voting by elected officials. App., *infra*, 11a-13a. According to the Fifth Circuit, there is "no question that political expression such as [council members'] * * * votes on City matters is protected speech under the First Amendment." *Colson* v. *Grohman*, 174 F.3d 498, 506 (1999). Restrictions affecting such speech, in turn, are subject to "strict scrutiny" in the Fifth Circuit. See *Jenevein* v. *Willing*, 493 F.3d 551, 558 (2007).

In *Jenevein*, the Fifth Circuit recognized that a deferential standard of review applies to regulations limiting the speech of government employees. 493 F.3d at 557. But the court reasoned that an *elected* government employee has a "relationship with his employer differ[ent] from that of an ordinary state employee" because the employer of elected officials "is the public itself, at least in the practical sense, with the power to hire and fire." *Ibid.* In light of this difference—and because elected officials' expressions of views are "political speech at the core of the First

Amendment"—the Fifth Circuit applied strict scrutiny when assessing an ethics commission's order censuring an elected judge for speaking publicly about a pending case. *Id.* at 555, 557-558. The Fifth Circuit later confirmed that its analysis in *Jenevein* extends to all elected officials, not judges alone, and that strict scrutiny would apply to a statute that limits city council members' speech. *Rangra* v. *Brown*, 566 F.3d 515, 525-526, reh'g en banc granted, 576 F.3d 531, vacated as moot, 584 F.3d 206 (2009).[5]

B. Three Circuits Analyze Voting Restrictions Under The Government-Employee Speech Doctrine

The First, Second, and Ninth Circuits have concluded that voting by elected public officials is protected by the First Amendment, but those courts depart from the Fifth Circuit and the Nevada Supreme Court by applying a more flexible, less stringent standard of judicial review to measures that restrict elected officials' speech. Rather than strict scrutiny, these courts have adopted the

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[5] Two other circuits have rejected application of the government-employee speech doctrine to speech by elected public employees, but those circuits have not specified which standard should apply instead. See *Phelan* v. *Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246-1247 (10th Cir. 2000) (rejecting application of *Pickering* to an elected member of school board of trustees but declining to identify alternative standard of review); *Clarke* v. *United States*, 886 F.2d 404, 413, 416 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699, 700 (D.C. Cir. 1990) (refusing to apply *Pickering* to city council members but declining to select standard of review). *Clarke* also held that legislative votes qualify as protected speech, 886 F.2d at 411-413, while the Tenth Circuit has not addressed the question.

balancing test developed in government-employee speech cases, which weighs state interests against "the interests of [a government employee], as a citizen, in commenting upon matters of public concern." *Pickering* v. *Board of Education*, 391 U.S. 568 (1968); see also *Garcetti* v. *Ceballos*, 547 U.S. 410, 423 (2006); *Connick*, 461 U.S. at 150-151.

In *Miller* v. *Town of Hull*, 878 F.2d 523, 532 (1989), the First Circuit held that "the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment," and "[t]his is especially true when the agency members are elected officials." In a later case, however, the First Circuit noted that First Amendment protection for public officials' votes "is far from absolute," and ruled that voting restrictions should be analyzed under the *Pickering* standard because "public officials voting on matters of public concern * * * retain First Amendment protection '*so long as* [their] speech does not unduly impede the government's interest'" in efficient public services. *Mullin* v. *Town of Fairhaven*, 284 F.3d 31, 37 (2002) (emphasis added) (quoting *O'Connor* v. *Steeves*, 994 F.2d 905, 912 (1st Cir. 1993)).

The Second Circuit has also concluded that "[v]oting on public policy matters coming before a legislative body is an exercise of expression long protected by the First Amendment." *Camacho* v. *Brandon*, 317 F.3d 153, 161, 163 (2003). But it has nonetheless held that restrictions affecting a city

council member's voting freedom are properly analyzed "under *Pickering*." *Id.* at 163.[6]

Likewise, the Ninth Circuit has held that "the status of public officials' votes as constitutionally protected speech [is] established beyond peradventure of doubt." *Blair* v. *Bethel Sch. Dist.*, 608 F.3d 540, 545 (2010) (quoting *Stella* v. *Kelley*, 63 F.3d 71, 75 (1st Cir. 1995)). At the same time, however, that court has invoked the *Pickering* balancing test when analyzing rules that constrain speech by city council members. *DeGrassi* v. *City of Glendora*, 207 F.3d 636, 646 (2000). In *DeGrassi*, for instance, the Ninth Circuit weighed a council member's interest in fully participating in council meetings against the government's interest in preventing "potential conflict between [one's] role as a Council member and [one's] personal interest." See *ibid.* Citing *Pickering*, the court concluded that such conflict-of-interest rules were "reasonable" and permissible under the First Amendment. *Ibid.*

By departing from the Ninth Circuit's balancing test and treating restrictions on legislative voting as presumptively invalid under the First Amendment, the Nevada Supreme Court has done more than perpetuate doctrinal confusion; it has rendered the constitutionality of state and municipal voting rules dependent on where suit is filed. If an elected official

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[6] The plaintiff in *Camacho* was a non-elected legislative aide, but he asserted a third-party claim on behalf of Fuentes, an elected councilman. 317 F.3d at 159-160. Accordingly, the court's analysis turned on "whether Fuentes' activities"—which included voting against the mayor's budget—"enjoyed the protection of the First Amendment." *Id.* at 160.

of one of Nevada's seventeen counties, seventeen school districts, or eighteen cities challenges a voting rule in state court, strict scrutiny will apply. If the official files the *same* challenge in a Nevada federal court, the Ninth Circuit's balancing test will stand as binding precedent. When the meaning of the First Amendment turns on the happenstance of the court in which a suit is filed, an untenable conflict arises that requires this Court's intervention. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari was granted to resolve a conflict between the Eleventh Circuit and the Florida Supreme Court over which First Amendment standard of review applied to a disputed injunction).

C. Two Circuits Reject The Equation Of Speech And Voting And Thus Apply Rational-Basis Review

Unlike four circuits and the Nevada Supreme Court, the Seventh and Eighth Circuits have refused to equate elected public officials' voting with speech.[7] Writing for the Seventh Circuit, Judge Posner rejected the assumption that "freedom of speech is enlarged or contracted by rules" affecting state legislators' votes because in that context, "'the right to vote, per se, is not a constitutionally protected right,' and the right to speak is." *Risser* v. *Thompson*, 930 F.2d 549, 553 (7th Cir. 1991) (quoting *Rivera-*

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[7] The Sixth Circuit has recognized that jurists are divided on this point. See *Zilich* v. *Longo*, 34 F.3d 359, 363 & n.3 (1994) (stating that legislative voting "may" be speech but noting the conflict between the First Circuit and Justice Brennan's *Spallone* dissent).

Rodriguez v. *Popular Democratic Party*, 457 U.S. 1, 9 (1982)). The court acknowledged that "the power of one's speech can indeed be augmented or diminished by voting power," but it dismissed that connection as too tenuous to transform voting into speech. *Ibid.* Judge Posner then concluded that equating speech and public officials' voting is an "analogy gone wild." *Ibid.* Consequently, the court rejected the plaintiff-legislators' First Amendment claim without further analysis and effectively endorsed rational-basis review for restrictions affecting voting. See *id.* at 553-554 (noting that statute was a "rational measure" to accomplish a legislative goal).[8]

Similarly, the Eighth Circuit has recognized that measures regulating elected public officials' voting have only a "conceivabl[e]" relationship to elected officials' free-speech rights. *Peeper*, 122 F.3d at 623 n.4. In *Peeper*, the governing board of a county ambulance district—a political subdivision of a state—prohibited one of its publicly elected members from voting on employee-related matters because her

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[8] Although the Seventh Circuit did not explicitly articulate which standard of review it was applying, its rationale dictates that rational-basis review applies by default. See, *e.g.*, *Lyng* v. *Auto. Workers*, 485 U.S. 360, 370 (1988) ("Because the statute challenged here has no substantial impact on any fundamental interest * * * we confine our consideration to whether the statutory classification 'is rationally related to a legitimate governmental interest.'") (quoting *Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 533 (1973)). Even if, contrary to *Risser*, the Seventh Circuit were to equate legislative voting and speech, it would apply *Pickering* to restrictions on such speech, in conflict with the decision below. See *Siefert*, 608 F.3d at 985 (applying *Pickering* to restrictions on speech by elected officials).

husband worked for the district. *Id.* at 620-621. Peeper was "directed to recuse herself" from "hearing, participating in, or voting upon" employee issues. *Id.* at 621. The Eighth Circuit concluded that this voting restriction did not implicate Peeper's free-speech rights, *id.* at 623 n.4, and therefore eschewed the "rigid strict-scrutiny standard" in favor of "rational-basis review." *Id.* at 623.

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The courts are deeply divided about whether and how the First Amendment applies to laws and rules that regulate voting by elected officials. The standards range from strict scrutiny, which would render even content-neutral conflict-of-interest provisions presumptively unconstitutional, to rational basis review, under which courts accord states and localities broad latitude to adopt rules requiring office-holders to refrain from voting on matters in which they have an interest. In between are the circuits that apply the *Pickering* balancing standard. This three-way conflict, and the deeper doctrinal confusion that it represents, shows no sign of abating absent review by this Court.

II. THE NEVADA SUPREME COURT ERRED IN APPLYING STRICT SCRUTINY TO RESTRICTIONS ON VOTING BY ELECTED OFFICIALS

The Nevada Supreme Court concluded that because voting is a form of speech, all restrictions affecting voting by elected public officials are subject to strict scrutiny. App., *infra* 11a-13a. Even if such voting is considered speech, however, strict scrutiny is clearly the wrong standard to apply. This Court

has reserved strict scrutiny for restrictions on private speech that "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 643 (1994). The Court has applied a less exacting standard to laws that do not target the "speaker's point of view," *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), to regulations that seek to advance government interests unrelated to the suppression of ideas, *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289 (2000), or that target only the "secondary effects" of speech. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). Indeed, in the context of public employee speech, the Court has refused to apply strict scrutiny even to content-based official action. See *Garcetti*, 547 U.S. at 418. This Court's decisions clearly support the application of a more deferential standard to assess restrictions affecting the voting of elected officials.

A. This Court's Decisions In A Number Of Contexts Indicate That Restrictions On Voting By Elected Public Officials Should Not Be Subject To Strict Scrutiny

Legislative voting could be characterized as pure speech, analogized to an ordinary citizen's vote, or treated as expressive or government conduct. Regardless of how it is characterized, strict scrutiny is not the proper standard to assess a regulation of voting like the one at issue here.

1. If voting by elected public officials is considered pure speech, one appropriate framework would be the balancing standard established for government employee speech in *Pickering* and

Connick and recently refined in *Garcetti*. Under that test, speech made by a government employee "on a matter of public concern" and not "pursuant to official duties" may be protected by the First Amendment. *Garcetti*, 547 U.S. at 418, 421. The government may even restrict speech based on its content, when the "interest in the effective and efficient fulfillment of its responsibilities to the public" outweighs the employee's interest in speaking. *Connick*, 461 U.S. at 150.

The Nevada Supreme Court's conclusion that the *Pickering* standard applies to appointed officials but not elected ones is inconsistent with this Court's decision in *United States* v. *Nat'l Treasury Emp. Union ("NTEU")*, 513 U.S. 454 (1995). There, this Court applied *Pickering* to § 501(b) of the federal Ethics Reform Act of 1989, which prohibited an "officer or employee" of the federal government from accepting compensation for an "appearance, speech or article." *Id.* at 459-460. Though the plaintiffs were low-level executive branch employees, the ban applied equally to the legislative and judicial branches. *Id.* at 458. Noting that the "the Government ha[d] based its defense of the ban on abuses of honoraria by Members of Congress," the majority struck down § 501(b) only as applied to the plaintiffs, leaving it intact as to elected officials. *Id.* at 472-473, 479-480. In reaching that conclusion, this Court compared the burdens imposed and the governmental interests supporting the ban as applied to low-level Executive Branch employees with the burdens and interests implicated for lawmakers. *Id.* at 469–470, 472–73. None of the opinions in that case so much as hints that a different First

Amendment standard might apply to elected officials and employees. Although *NTEU* did not squarely address the issue, it strongly suggests that *Pickering* would apply to elected officials just as it applies to employees.

2. If legislative voting is instead considered expressive conduct, it should be subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). See also *Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting) ("While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance."). Under that standard, a regulation on conduct that burdens speech only incidentally is permissible as long as it is content-neutral and "narrowly focuses on [a] substantial interest." *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984).

Nevada's recusal provision is unquestionably content-neutral because its application to conduct does not "depend[] on [its] likely communicative impact." *Texas* v. *Johnson*, 491 U.S. 397, 411 (1989). The conditions triggering the recusal requirement—"commitment in a private capacity to the interests of others," Nev. Rev. Stat. § 281A.420(2)(c)—do not depend on likely communicative impact. The regulation is solely designed to prevent conflicts of interest, which all agree is a compelling governmental interest. Accordingly, as a content-neutral regulation of expressive conduct, Nev. Rev. Stat. § 281A.420(2)(c) would easily survive *O'Brien*'s requirement that it "narrowly focuses on [a] substantial interest." *Clark*, 468 U.S. at 296.

3. If voting by elected public officials warrants the same level of protection as the voting of ordinary citizens, this Court's observation in *Burdick* v. *Takushi*, 504 U.S. 428, 432–433 (1992), is the place to begin: it is, the Court concluded, an "erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." Instead, restrictions on a citizen's right to vote are subject to a "more flexible standard." *Id.* at 434 (citing *Anderson* v. *Celebrezze*, 460 U.S. 780, 788-789 (1983)). That standard "weigh[s] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' * * * against the precise interests put forward by the State." *Ibid.* (quoting *Anderson*, 460 U.S. at 789).

4. Finally, voting by elected public officials may not be entitled to any special constitutional protection at all. As the Seventh Circuit has recognized with respect to state legislators, "the right to vote, per se, is not a constitutionally protected right." *Risser*, 930 F.2d at 553 (quoting *Rivera-Rodriguez*, 457 U.S. at 9); see also *Peeper*, 122 F.3d at 623 (expressing doubt that voting is expressive speech). If voting by elected public officials is not constitutionally protected, it follows that restrictions affecting voting should be subject only to rational-basis review. *See Peeper*, 122 F.3d at 623 (applying rational basis review to voting restriction).

However voting by elected public officials is characterized, the Nevada Supreme Court's decision conflicts with this Court's First Amendment jurisprudence. There is no basis in this Court's case law for applying strict scrutiny to such voting; all lines of relevant cases suggest another standard

applies. Cf. *Doe*, 130 S. Ct. at 2833 (Scalia, J., concurring in judgment).

B. *Citizens United* Does Not Support Applying Strict Scrutiny

The Nevada Supreme Court cited this Court's decision in *Citizens United* for the proposition that "[l]aws that burden political speech are subject to strict scrutiny." App., *infra*, 13a (quoting *Citizens United*, 130 S. Ct. at 898). But *Citizens United* does not remotely support the reasoning below. In that decision, this Court applied strict scrutiny to the Bipartisan Campaign Reform Act of 2002, a content-based restriction on corporate funding of traditionally protected political speech. 130 S. Ct. at 900. The voting regulated by the Nevada recusal statute, however, has never enjoyed the constitutional solicitude this Court has shown electioneering communications of the sort at issue in *Citizens United*. The bare, unadorned statement from *Citizens United* relied upon by the court below thus provides no support for applying strict scrutiny to voting by elected public officials.

III. THIS CASE PRESENTS IMPORTANT ISSUES ABOUT THE STANDARD GOVERNING FIRST AMENDMENT REVIEW OF STATE RECUSAL REQUIREMENTS

State recusal requirements prevent conflicts of interest from distorting public decisionmaking. For over a century, courts acting under common law principles have required public officials to recuse themselves from matters when their service presents an actual or potential conflict. In addition, states

have broadly enacted recusal statutes establishing standards for disqualification. These efforts embody a recognition that "an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." *United States* v. *Miss. Valley Generating Co.*, 364 U.S. 520, 549 (1961). By regulating conflicts of interest, these provisions seek to prevent both corruption and the appearance of corruption. See David Orentlicher, *Conflicts of Interest and The Constitution*, 59 Wash & Lee L. Rev. 713, 719-720 (2002). This Court has "long recognized" that those are important governmental interests. See *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (citing *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976)).

By applying strict scrutiny to Nevada's recusal statute, and by invalidating as facially overbroad a provision requiring recusal of persons who have a "commitment or relationship that is substantially similar" to explicitly proscribed family, household, employment, and business relationships, the decision below calls into question the validity of numerous state recusal standards that are widely recognized as critical for effective enforcement. Absent this Court's review, the decision below threatens to undermine enforcement of states' ethics laws and immerse states in litigation over the constitutionality of their recusal requirements. This petition thus presents an issue of exceptional national importance. Cf. Texas Pet. for Reh'g En Banc at 14, *Rangra* v. *Brown*, No. 06-51587 (5th Cir. May 8, 2009) (successfully seeking en banc review of decision holding that Texas Open Meetings

Act was subject to strict scrutiny as an infringement of elected legislators' speech, noting "nationwide importance" of issue); Brief Amicus Curiae of 19 States Supporting Reh'g, *Rangra* v. *Brown*, No. 06-51587 (5th Cir. Sept. 4, 2009).

A. The Decision Below Calls Into Question Statutory Recusal Provisions

All fifty states regulate public officials' conflicts of interest.[9] As of 2000, approximately thirty-seven states require public officials not to vote on matters presenting a conflict of interest. See Office of Legislative Research, Conn. Gen. Assembly, Voting Restrictions in State Ethics Codes (Research Rep. No. 2000-R-0155, Feb. 2000), http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0155.htm. In contrast to the recusal provision at issue here, which narrowly applies to conflicts that are "substantially similar" to four specific types of commitments or relationships, many states' statutes employ very general language to prevent circumvention and abuse. See Note, *Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation*, 107 U. Pa. L. Rev. 985, 985 (1959) (noting that conflict-of-interest laws for public officials are often drafted in general and broad terms). The decision below calls the validity of general recusal standards into question.

In some states, the requirements for recusal are stated at a most general level. See, *e.g.*, Va. Code Ann. § 30-108 (2001) ("A legislator who has a

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[9] For a comprehensive list of these provisions, see National Conference of State Legislatures, Voting Recusal Provisions (Oct. 2009), http://www.ncsl.org/?TabId=15357.

personal interest in a transaction shall disqualify himself from participating in the transaction."). Others broadly define the types of relationships that might subject an official to recusal. See, *e.g.*, N.C. Gen. Stat. § 138A-37(a) (2006) ("[N]o legislator shall participate in legislative action if the legislator knows the legislator or *a person with which the legislator is associated* may incur a reasonably foreseeable financial benefit from the action") (emphasis added). New Jersey requires public officials to recuse based on a number of specific relationships that are "incompatible with the discharge" of official duties. See N.J. Admin. Code. § 19:61-7.4(d)-(e) (2010). However, the state's regulation also provides more generally that an "incompatible financial or personal interest may exist in other situations which are not clearly within the provisions above * * *, depending on the totality of the circumstances." *Id.* § 19:61-7.4(f).

The decision below thus calls into question a large number of other states' recusal provisions and could subject them to litigation. If the Nevada provision, which specifies that relationships "substantially similar" to four specified disqualifying relationships does not speak with the requisite "high level of [statutory] clarity," App., *infra*, 14a, other states' provisions are obviously vulnerable to legal challenge. See, *e.g.*, Ariz. Rev. Stat. Ann. § 38-503(B) (1968) (requiring recusal when the official or a relative has "a substantial interest in any decision of a public agency"). At a minimum, the decision below exposes other states to litigation to defend the constitutionality of these provisions, which until now were understood to pose no constitutional difficulties.

State recusal provisions are too important for this risk to escape this Court's notice. Because application of strict scrutiny threatens to unsettle longstanding state efforts to avoid conflicts of interest, this Court's review is warranted.

B. The Decision Below Casts Doubt On The Constitutionality Of A Century Of Common Law Governing The Recusal Obligations Of Public Officials

For more than a century, courts applying common law principles have required public officials to recuse themselves from matters in which they have a conflict of interest. See *President & Trs. of San Diego* v. *San Diego & Los Angeles R.R. Co.*, 44 Cal. 106, 113 (1872). Although most states have since adopted recusal statutes, the common law remains significant for two reasons. First, it is used to interpret state recusal statutes, as these statutes largely track common law standards. *Randolph* v. *City of Brigantine Planning Bd.*, 963 A.2d 1224, 1230 (N.J. Super. Ct. App. Div. 2009). Second, because these statutes do not always codify the entirety of a state's common law governing conflicts of interests, the common law remains an independent source of recusal obligations for public officials. See *e.g.*, *Carney* v. *State Bd. of Fisheries*, 785 P.2d 544, 547-48 (Alaska 1990); *Price* v. *Edmonds*, 337 S.W.2d 658, 660 (Ark. 1960).

The decision below calls into question this entire body of law. Compared to the detailed and specific provisions of the Nevada Ethics in Government Law, the common law standards are far more general and thus open to legal challenge. Under the common law, there is "[n]o definite test" governing recusal. *Van*

Itallie v. *Borough of Franklin Lakes*, 146 A.2d 111, 116 (N.J. 1958). Instead, recusal is required whenever the "peculiar facts and circumstances of the particular case" might reasonably suggest a conflict of interest to an objective person. *Anderson* v. *City of Parsons*, 496 P.2d 1333, 1337 (Kan. 1972); see also *Sec. Nat'l Bank of Mason City* v. *Bagley*, 210 N.W. 947, 951 (Iowa 1926); *Siesta Hills Neighborhood Ass'n* v. *City of Albuquerque*, 954 P.2d 102, 105 (N.M. Ct. App. 1998). One court has recognized four broad categories requiring recusal, including three specific relationships like those identified by the Nevada Ethics in Government Law, plus a broader category for an "indirect personal interest." *Hanig* v. *City of Winner*, 692 N.W.2d 202, 208-209 (S.D. 2005) (citing *Wyzykowski* v. *Rizas*, 626 A.2d 406, 414 (N.J. 1993)). Under that standard, courts have routinely disqualified officials in situations similar to those of this case. See, *e.g.*, *Kremer* v. *City of Plainfield*, 244 A.2d 335 (N.J. Super. Ct. Law Div. 1968) (requiring a council member to recuse himself where his nephew was a partner in the law firm representing an applicant); *Kloter* v. *Zoning Comm'n of Vernon Fire Dist.*, 227 A.2d 563, 566-567 (Conn. C.P. 1967) (holding a public official was required to recuse himself where the applicant was his long-time accountant and tax adviser).

The common law's case-by-case approach has never before been thought to raise constitutional questions. But the decision below now places this important and longstanding body of law at risk by subjecting it to the presumptive invalidity of strict scrutiny and providing a basis for constitutional challenges. See generally 28 U.S.C. §§ 1983, 1988.

At the very least, one can expect the decision below to spawn countless challenges by local officials against this important body of law.

C. Applying Strict Scrutiny To Voting By Elected Public Officials Would Call Into Question A Host Of Routine Restrictions Placed On Local Governments

It is well established that states have substantial discretion in determining how much local control to afford political subdivisions, such as municipalities. See *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907). Accordingly, a state legislature's judgments about whether to permit local control on an issue or to resolve it through the state legislature has never before been thought to present a constitutional question. If voting is considered pure political speech and voting restrictions are subject to strict scrutiny, however, the ability of states to remove matters from local control would encounter a significant new obstacle. Local officials could claim that such restrictions impair their First Amendment rights and are therefore presumptively invalid under strict scrutiny. A few examples suffice to illustrate the scope of litigation that could ensue under this approach.

Public officials' voting discretion in approving local health and safety laws is routinely limited by measures designed to make those laws consistent with state and federal regulations. Thus, state legislators may impose new requirements requiring local governments to take specified action where they previously had a choice—by, for example, prohibiting development unless certain environmental conditions are met. See, *e.g.*, *City of Cambridge* v. *Attorney*

General, 571 N.E.2d 386 (Mass. 1991) (holding that state may require local governments to approve health insurance plans giving their employees the same benefits as other state employees); *State Bd. of Health* v. *City of Greenville*, 98 N.E. 1019 (Ohio 1912) (holding that state may require city officials to approve the installation of sewage purification works by coercing the officials' votes through threats of penalties); *Consol. Rail Corp.* v. *Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987) (holding that municipal government could not pass an ordinance requiring trains to travel at a speed lower than that imposed under federal regulations).

Such restrictions have never been invalidated before on the basis of the First Amendment, as they neither target nor primarily affect public officials' right to express themselves. But under the decision below, officials could claim that the voting restriction impairs their previous ability to vote on the subject, in contravention of their First Amendment rights, and the restriction would be subject to strict scrutiny. Thus, such provisions are now constitutionally vulnerable and an attractive target for litigation.

Similarly, in order to prevent corruption and promote efficiency, state governments have traditionally limited public officials' discretion in approving contracts between local governments and vendors by imposing procedural and substantive regulations. The most common of these restrictions is to require public officials to approve the vendor who submitted the lowest responsible bid in a competitive process. See *Los Angeles Dredging Co.* v. *City of Long Beach*, 291 P. 839 (Cal. 1930); *426 Bloomfield Ave. Corp.* v. *City of Newark*, 621 A.2d 59, 62 (N.J. Super.

Ct. App. Div. 1993). The purpose of these restrictions, obviously, is not to limit an elected public official's right to free speech. But under the decision below, such restrictions—particularly when newly adopted—may be subject to challenge for impairing a local official's ability to vote on the subject.

Even routine federal conditional spending programs and mandate programs could be subject to challenge under the decision below. Under such programs, the federal government may require local governments to take certain actions as a condition of receiving federal grant money. While the courts have recognized that Congress has broad authority to impose such conditions, see *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (holding conditional spending constitutional despite its impact on public officials' choice); *California* v. *United States*, 104 F.3d 1086 (9th Cir. 1997) (rejecting claim that conditional federal assistance eliminates voluntary choice), conditional spending programs could be subject to challenge because they necessarily restrict the ability of local public officials to vote in a particular way. Under the reasoning of the decision below, officials could claim that a conditional spending program has placed an unconstitutional condition on their right to vote. Similar challenges could be made to state mandates requiring local officials to implement programs that advance state public policy. See *Opinion of the Justices*, 238 N.E.2d 855 (Mass. 1968). Thus, the decision below will subject well established and routine inter-governmental programs to novel constitutional challenges that will necessarily disrupt and burden their operation.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE ISSUE

This case presents an ideal opportunity to resolve this important and recurring issue. This case squarely presents a single question of federal law: what protection the First Amendment affords to an elected official's vote. The case's procedural history reveals no disputes over facts, the meaning or application of state law, or jurisdiction that would interfere with this Court's resolution of the First Amendment issue. In his petition seeking state court review of the Commission's decision and before the Nevada Supreme Court, Carrigan challenged neither the censure's factual basis nor the Commission's interpretation or application of state law. The Nevada Supreme Court's holding that Nev. Rev. Stat. § 281A.420(8)(e) violated the First Amendment rested solely upon interpretation and application of federal law. Its opinion reveals no state grounds that would supply an alternative basis for its judgment.

The issue is now ripe for review. In both the Nevada District Court and Supreme Court, the First Amendment question was fully briefed and conclusively decided. The Nevada Supreme Court's majority and dissenting opinions explored the issue thoroughly. That discussion marshaled differing perspectives from among the federal courts of appeals, which have wrestled with the issue for well over a decade. Nothing more would be gained from allowing the issue to percolate further.[10]

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[10] This case warrants review regardless of what action this Court takes on the pending petitions in *Siefert* v. *Alexander*, 10-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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405 (filed Sept. 22, 2010), and *Bauer* v. *Shepard*, 10-425 (filed Sept. 24, 2010). Both cases involve restrictions on the actual speech of judges, including restrictions on individual and party fundraising solicitation and endorsements of political candidates. See Pet. for Cert. 2, *Siefert*; Pet. for Cert. 3-9, *Bauer*. Neither case presents an opportunity to address the proper standard of review to apply to restrictions on voting by elected public officials, nor would they address whether voting is a form of speech protected by the First Amendment.

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October 27, 2010

Appendix A

Nevada Supreme Court Opinion

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. CARRIGAN, FOURTH WARD CITY COUNCIL MEMBER OF THE CITY OF SPARKS, Appellant, vs. THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, Respondent.	No. 51920 FILED JUL 29, 2010

Before the Court En Banc.[1]

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider whether the Nevada Commission on Ethics' censure of an elected public officer for alleged voting violations under NRS

[1]The Honorable Ron Parraguirre, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

281A.420(2)(c) violates the First Amendment.[2] NRS 281A.420(2)(c) sets forth one of the legal standards for determining whether a public officer must abstain from voting on a particular matter, based on the officer's "commitment in a private capacity to the interests of others." NRS 281A.420(8) defines this commitment to include four specific prohibited relationships between a public official and others and describes a fifth catchall definition as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." The catchall definition of a prohibited relationship by a public official in NRS 281A.420(8)(e) confronts the First Amendment on appeal.

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[2]NRS 281A.420 was formerly NRS 281.501. 2007 Nev. Stat., ch. 538, § 3.8, at 3372. While the Commission's decision referred to NRS 281.501, the parties' briefs have referred to the 2007 version of the statute, NRS 281A.420, which we likewise follow in this opinion.

We acknowledge that the Legislature further amended NRS 281A.420 in 2009. 2009 Nev. Stat., ch. 257, § 9.5, at 1057. However, contrary to the assertions made by the dissent in footnote 5, we conclude that these amendments are insufficient to cure the statute's constitutional deficiencies. In particular, we note that the statute still does not provide sufficient limitations on what relationships may require abstention from voting. The language cited in footnote 5 of the dissent also does nothing to define the "clear cases" that require abstention from voting. Therefore, the statute remains overbroad and not the least restrictive means to promote the statute's goals. Accordingly, we reject the dissent's contention that this appeal should only be analyzed on as-applied basis.

We first conclude that voting by public officers on public issues is protected speech under the First Amendment. Because NRS 281A.420(2)(c) directly involves the regulation of protected speech by a public officer in voting, we next determine that the definitional statute NRS 281A.420(8)(e) must be strictly scrutinized under a First Amendment overbreadth analysis. Applying a strict scrutiny standard, we conclude that NRS 281A.420(8)(e) is unconstitutionally overbroad in violation of the First Amendment, as it lacks necessary limitations to its regulations of protected speech. Consequently, the district court erred in its interpretation of NRS 281A.420(8)(e) and its application to NRS 281A.420(2)(c), and thus, we reverse the district court's order.

FACTS

Appellant Michael A. Carrigan was first elected to the Sparks City Council in 1999 and has twice been reelected. During each of his election campaigns, Carrigan's longtime professional and personal friend, Carlos Vasquez, served as his campaign manager. In addition to serving as Carrigan's campaign manager, Vasquez worked as a consultant for the Red Hawk Land Company. In that role, Vasquez was responsible for advising Red Hawk on various matters pertaining to the development of a hotel/casino project known as the Lazy 8.

In early 2005, Red Hawk submitted an application to the City of Sparks regarding the Lazy 8 project. The Sparks City Council set the matter for a public hearing. Before the hearing, and in light of the longstanding relationship between Carrigan and

Vasquez, Carrigan consulted the Sparks City Attorney for guidance regarding any potential conflict of interest. The City Attorney advised Carrigan to disclose, on the record, any prior or existing relationship with Vasquez before voting on the Lazy 8 matter. Taking the City Attorney's advice, Carrigan made the following disclosure before casting his vote:

> I have to disclose for the record . . . that Carlos Vasquez, a consultant for Redhawk, . . . is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight.
>
> [T]herefore, according to [NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue.

A few weeks after Carrigan cast his vote, respondent Nevada Commission on Ethics received several complaints regarding a possible conflict of interest. The Commission reviewed the complaints and authorized an investigation.

Upon completion of the investigation, the Commission issued a written decision censuring Carrigan for violating an ethics law, NRS 281A.420(2), by failing to abstain from voting on the Lazy 8 matter.[3] The Commission found that Carrigan

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[3]The Commission determined that Carrigan's action did not constitute a willful violation of NRS 281A.420(2), and thus, it did not impose a civil penalty. NRS 281A.480.

had improperly voted on the Lazy 8 "matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [his] commitment in a private capacity to the interests of others." *See* NRS 281A.420(2)(c). To reach this conclusion, the Commission evaluated the legislative history of the definitions of prohibited relationships by a public official contained in NRS 281A.420(8) and determined that the Legislature enacted NRS 281A.420(8)(e) to cover "commitments and relationships that, while they may not fall squarely within those enumerated in [NRS 281A.420(8)(a)-(d)], are substantially similar to those enumerated categories because the independence of judgment may be equally affected by the commitment or relationship." In particular, the Commission found that Carrigan's relationship with Vasquez came within the scope of NRS 281A.420(8)(e), in that the relationship "equates to a 'substantially similar' relationship to those enumerated under [NRS 281A.420(8)(a)-(d)]" and "[is] illustrative of [relationships] contemplated by [NRS 281A.420(8)(e)]." In other words, the Commission found that Carrigan should have known that his relationship with Vasquez fell within the catchall definition and prevented him from voting on Red Hawk's application for the Lazy 8 project.

Carrigan filed a petition for judicial review with the district court to challenge the Commission's decision. The district court denied the petition based on its determination that the state has a strong interest in having an ethical government, which outweighs a public officer's and state employee's

protected free speech voting right. The court further rejected Carrigan's challenges to the constitutionality of the statute, based on overbreadth and vagueness. This appeal followed. The Legislature of the State of Nevada was granted permission to file an amicus brief in support of the Commission's position.

DISCUSSION

Carrigan challenges the constitutionality of the Commission's censure on several grounds: overbreadth, vagueness, and unconstitutional prior restraint on speech. To resolve this appeal, we focus on Carrigan's First Amendment challenge in which he argues that NRS 281A.420(8)(e) is unconstitutional in violation of his free speech rights.[4] Carrigan asserts that voting by a public officer is protected speech and therefore the statute should be reviewed under a strict scrutiny analysis, and under that analysis, the statute must be declared unconstitutional because the statute is not narrowly tailored to meet a compelling government interest. *See Citizens United v. Federal Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 898 (2010). The Commission and the Legislature (as amicus) assert that the district court properly concluded that the statute should be reviewed under a less strict

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[4]In light of our resolution on Carrigan's overbreadth challenge, we need not address Carrigan's vagueness and prior restraint arguments in resolving this appeal. *See Director, Dep't Prisons v. Arndt*, 98 Nev. 84, 86, 640 P.2d 1318, 1320 (1982) (noting that "[i]t is well settled that this court will not address constitutional issues unless the[y] are requisite to the disposition of the case").

standard as outlined by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Under that standard, they argue, the interests of the state in preventing corruption outweigh Carrigan's free speech right to vote on an issue in which he has a disqualifying interest. Alternatively, the Commission contends that if strict scrutiny applies, NRS 281A.420 is constitutional because: "(1) Nevada has a compelling state interest in promoting ethical government and guarding the public from biased decision makers; and (2) the statutory provisions requiring disqualified public officers to abstain from voting constitutes the least restrictive means available to further the state's compelling interest."

In resolving this First Amendment challenge, we initially address whether voting on a particular matter by an elected public officer is protected speech under the First Amendment. Concluding that it is protected speech, we next consider Carrigan's overbreadth challenge. In doing so, we address the appropriate standard to apply in reviewing Carrigan's overbreadth challenge and determine that a strict scrutiny standard is required. Applying a strict scrutiny standard to the statute at issue, we conclude that subsection 8(e) is overbroad in violation of the First Amendment.[5]

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[5]The dissent disagrees with our analysis of this case, challenging our conclusions that subsection 8(e) of NRS 281A.420 is unconstitutionally overbroad and disputing the application of a strict scrutiny standard. The dissent's challenges to our conclusions are unpersuasive, however, as the dissent misunderstands the pertinent issue raised in this

Standard of review

This court, like the district court, reviews an appeal from an "administrative decision for clear error or abuse of discretion." *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). While the instant matter involves an appeal from an administrative decision, Carrigan's arguments on appeal present purely legal questions, which we review de novo. *Howard v. City of Las Vegas*, 121 Nev. 691, 693, 120 P.3d 410, 411 (2005).

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appeal. The dissent improperly focuses on the question of whether recusal is an appropriate requirement to promote the Legislature's goal of avoiding impropriety when a publicly elected official has a conflict of interest. We do not dispute that requiring recusal under certain circumstances is appropriate and related to addressing conflict of interest concerns. But that is not the issue on appeal. The issue on appeal is whether the statute that establishes the recusal requirement provides sufficient limitations and explanations concerning when recusal is required to avoid overreaching into unnecessary situations. In other words, the dissent focuses on whether the required conduct is appropriate, instead of focusing on whether the statute creating the required conduct is constitutional. The dissent, in essence, reviews this case under an as-applied challenge concerning whether requiring recusal is allowed, instead of reviewing it as a facial challenge regarding whether the statute that creates the recusal requirement does so with sufficient limitation and clarity to avoid violating constitutional rights. We do not conclude that NRS 281A.420(8)(c) is unconstitutional because the Legislature can never require recusal; it is unconstitutional because the Legislature failed to establish the appropriate circumstances under which recusal can be required in accordance with constitutional protections. Because the dissent focuses on an entirely different issue than that raised in this appeal and addressed by this opinion, we do not respond further to the specific arguments made or legal authorities relied upon by the dissent.

Also, because the constitutionality of a statute is a question of law, our review is de novo. *Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

Voting by public officers

The Ethics in Government statute at issue in this case is NRS 281A.420.[6] NRS 281A.420(2)(c) requires that

> a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by ... [his] *commitment in a private capacity to the interests of others.*

(Emphasis added.) NRS 281A.420(8) defines the "commitment in a private capacity to the interests of others" as a commitment to a person:

> (a) Who is a member of his household;
>
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
>
> (c) Who employs him or a member of his household;
>
> (d) With whom he has a substantial and continuing business relationship; or
>
> (e) *Any other commitment or relationship that*

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[6]NRS 281A.010 provides that NRS Chapter 281A "may be cited as the Nevada Ethics in Government Law."

> *is substantially similar to a commitment or relationship described in this subsection.*

(Emphasis added.) Central to this controversy is paragraph (e).

The act of voting by a public officer is protected speech under the First Amendment

Initially, we must determine whether NRS 281A.420 regulates protected speech under the First Amendment. Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment applies to state governments through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). Although this court has not directly addressed whether voting on matters by an elected public officer is protected speech, other courts have recognized that "[t]here is no question that political expression such as [a city council member's] positions and votes on City matters is protected speech under the First Amendment." *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999); *accord Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982))); *see also Miller v. Town of Hull, Mass.*, 878 F.2d 523, 532 (1st Cir. 1989) (stating that "we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment"). Recently we recognized in *Commission on Ethics v. Hardy*, 125 Nev. ___, ___, 212 P.3d 1098,

1106 (2009), that "voting on legislation is a core legislative function."[7] Because voting is a core legislative function, it follows that voting serves an important role in political speech. Based on our recognition of voting as a core legislative function, and in connection with other jurisdictions' holdings that voting in a legislative setting is protected speech, we conclude that voting by an elected public officer on public issues is protected speech under the First Amendment.

Overbreadth

A strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues

Having concluded that voting by an elected public officer on public issues is protected speech under the First Amendment, we must next determine the appropriate standard to apply in reviewing the constitutionality of NRS 281A.420(8)(e). Carrigan argues that a strict scrutiny standard applies because voting is protected free speech. The Commission contends, and the district court agreed, that Carrigan's free speech rights must be analyzed under the two-part balancing inquiry enunciated by the United States Supreme Court in *Pickering v. Board of*

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[7]Despite the dissent's assertions, we do not cite to *Hardy* for the propositions that First Amendment protection is extended to a local government official's vote on a land use matter, such a vote is core political speech, or that *Hardy* specifically speaks to the issue in this case. We do, however, cite to *Hardy* for the proposition that voting on legislation is a core legislative function and that political speech is a core function of a public officer. *Hardy*, 125 Nev. at ___, 212 P.3d at 1106.

Education, 391 U.S. 563 (1968), because Carrigan, as an elected city council member, is a state employee. Therefore, the Commission argues that the state's interests, as Carrigan's employer, in establishing an efficient government must be balanced with Carrigan's free speech rights as an employee.

The *Pickering* balancing test is a lower standard of review used in situations involving a state employee. 391 U.S. at 568. This standard is based on the view that the state, as an employer, has a stronger interest in regulating an employee's speech than in regulating the speech of the general public, in order to promote efficiency in the public services it offers, while also recognizing that a citizen does not forfeit all free speech rights when working for the government. *Id.* Under the *Pickering* balancing test, the court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

Carrigan's relationship with the state differs from that of most public employees, however, because he is an elected officer "about whom the public is obliged to inform itself, and the 'employer' is the public itself, at least in the practical sense, with the power to hire and fire." *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007). While Carrigan is employed by the government, he is an elected public officer, and his relationship with his "employer," the people, differs from that of other state employees. *Id.* Therefore, the district court erred in applying the *Pickering* balancing test.

Instead, a strict scrutiny standard applies. NRS 281A.420 establishes requirements for when a public officer must refrain from exercising speech by abstaining from voting on certain public issues. Thus, the statute deals directly with regulating speech, and as recognized in *Hardy*, political speech is a core function of a public officer. Strict scrutiny is therefore the appropriate standard. *See Citizens United v. Federal Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 898 (2010) (stating that "[l]aws that burden political speech are subject to strict scrutiny") (internal quotations omitted); *Nordyke v. King*, 563 F.3d 439, 460-61 (9th Cir. 2009) (stating that a law that directly regulates speech is subject to strict scrutiny).

NRS 281A.420(8)(e) is facially overbroad

We now consider Carrigan's overbreadth challenge to NRS 281A.420(8)(e) under the applicable strict scrutiny standard. In determining whether the statute is unconstitutionally overbroad, we must keep in mind that this is a facial challenge.[8] A facial challenge requires striking a balance between the

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[8]While generally a facial challenge cannot be maintained by someone whose conduct the statute could validly regulate, there is an exception to this rule under First Amendment overbreadth challenges based on the danger that an overbroad statute's "'very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Thus, the Commission's arguments that the statute should not be declared invalid because it could be constitutionally applied to Carrigan are unavailing, and we need not consider them further.

competing interests of protecting the exercise of free speech rights—as an overbroad statute "deters people from engaging in constitutionally protected speech"—with the potential harm in invalidating a statute that may be constitutional in some of its applications. *United States v. Williams*, 553 U.S. 285, 292 (2008). Because invalidating a statute for overbreadth is "strong medicine," it should "not be casually employed." *Id.* at 293 (internal quotations omitted).

Under a strict scrutiny standard, the United States Constitution demands a high level of clarity from a statute seeking to regulate constitutionally protected speech. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). An overbroad law tends to chill the exercise of First Amendment rights by sweeping "'within its ambit other activities that in ordinary circumstances constitute an exercise of' protective First Amendment rights." *City of Las Vegas v. Eighth Judicial Dist. Ct.*, 118 Nev. 859, 863 n.14, 59 P.3d 477, 480 n.14 (2002) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). Under a facial overbreadth challenge, a statute should not be held void "'unless it is substantially overbroad in relation to the statute's plainly legitimate sweep.'" *Silvar v. Eighth Judicial Dist. Ct.*, 122 Nev. 289, 298, 129 P.3d 682, 688 (2006) (quoting *Coleman v. City of Richmond*, 5 Va. App. 459, 364 S.E.2d 239, 243 (1988)). A strict scrutiny standard "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 898 (internal

quotations omitted).[9]

Carrigan contends that NRS 281A.420(8)(e) is not narrowly tailored since the Commission arbitrarily determines whether a public officer's relationships are "substantially similar" to the other relationships listed in subsection 8. Carrigan argues that because the subsection 8(e) definition of "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection" does not provide sufficient limitations on what relationships may require abstention from voting, the statute is overbroad and is therefore not the least restrictive means available to promote the statute's goals. The Commission contends that NRS 281A.420(8)(e) is constitutional because it promotes a compelling state interest in maintaining an ethical government and protecting

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[9]Strict scrutiny has been described as ranking "among the most important doctrinal elements in constitutional law." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*. 54 UCLA L. Rev. 1267, 1268 (2007). Strict scrutiny is distinct from other forms of review and "varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a 'compelling state interest;' and demands that the regulation promoting the compelling interest be 'narrowly tailored.'" Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal Hist. 355, 359-60 (2006) (footnotes omitted); *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Greater New Orleans Broadcasting Ass'n. Inc. v. United States*, 527 U.S. 173, 183 (1999) ("the Government bears the burden of identifying a substantial interest and justifying the challenged restriction").

the public from bias, and the restrictions constitute the least restrictive means available to further the state's compelling interest.

We agree with the Commission that promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest that is consistent with the public policy rationale behind the Nevada Ethics in Government Law. *See* NRS 281A.020 (public policy for Nevada Ethics in Government Law). Thus, arguably, NRS 281A.420(8)(e) meets the first requirement under a strict scrutiny standard; the statute furthers a compelling state interest. The statute fails, however, to meet the "narrowly tailored" requirement.

NRS 281A.420(2)(c) requires that a public officer refrain from voting when, among other things, "the independence of judgment of a reasonable person in his situation would be materially affected by . . . his commitment in a private capacity to the interests of others." The phrase "commitment in a private capacity to the interests of others" is defined in part in NRS 281A.420(8)(e), which in relevant part states that this includes "a commitment to a person" with whom the public officer has a "commitment or relationship that is substantially similar" to one of the relationships outlined in subsection 8. NRS 281A.420(8)(e).

The definition of a "commitment in a private capacity" in subsection 8(e) fails to sufficiently describe what relationships are included within NRS 281A.420(2)(c)'s restriction. As a result, the statute's reach is substantially overbroad in its regulation of

protected political speech.

There is no definition or limitation to subsection 8(e)'s definition of any relationship "substantially similar" to the other relationships in subsection 8. This catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal. Thus, the statute has a chilling effect on the exercise of protected speech, for it threatens punishment for noncompliance, which "deters people from engaging in constitutionally protected speech." *Williams*, 553 U.S. at 292.

Based on the overly broad definition in NRS 281A.420(8)(e) of what constitutes a "commitment in a private capacity," NRS 281A.420(2)(c)'s abstention requirement for this category of relationships lacks necessary limitations to its protected speech regulation. Thus, NRS 281A.420(8)(e)'s application to a wide range of differing commitments and relationships is not narrowly tailored. Accordingly, NRS 281A.420(8)(e) is substantially overbroad, sweeps within its control a vast amount of protected speech, and violates the First Amendment.

Therefore, we declare NRS 281A.420(8)(e) unconstitutionally overbroad in violation of the First Amendment and reverse the district court's order.[10]

We concur: HARDESTY, CHERRY, SAITTA and GIBBONS, JJ.

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[10]Because issues as to other portions of the statute are not raised, this opinion only addresses these limited sections and does not make a determination as to the remainder of the statute.

PICKERING, J., dissenting:

Before today, no published decision has held that an elected local official engages in core political speech when he or she votes on an individual land use matter. Likewise, no published decision reviewing the ethical propriety of such a vote has subjected the applicable legislative prohibition against conflicts of interest to strict scrutiny or invalidated it on overbreadth grounds. Because I believe charting this course is both unprecedented and unwise, I respectfully dissent.

Separation of powers

Our decision in *Commission on Ethics v. Hardy*, 125 Nev. ___, 212 P.3d 1098 (2009), on which the majority relies, did not extend First Amendment protection to a local government official's vote on a land use matter[1] or declare such a vote to be core political speech. At issue in *Hardy* was whether, for

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[1]The Sparks City Council vote underlying this proceeding came before us in *Adams v. City of Sparks*, Docket Nos. 49504/49682/50251 (Order of Affirmance, July 21, 2009), where we held that the Lazy 8 vote represented a land use decision reviewable, if at all, by a petition for judicial review under NRS 278.3195(4). Although policy-setting land use planning ordinances qualify as legislative, local governments exercise quasi-adjudicative or administrative powers when they decide individual zoning or land use matters. *See Garvin v. Ninth Dist. Ct.*, 118 Nev. 749, 765, 59 P.3d 1180, 1190-91 (2002) (noting that our ballot initiative law holds individual land use decisions to be nonlegislative and hence not appropriate for direct democratic vote). Conflict-of-interest rules and due process concerns apply to individual land use decisions. *See Hantges v. City of Henderson*, 121 Nev. 319, 325-27, 113 P.3d 848, 851-53 (2005) (dictum).

separation-of-powers purposes, a member of the Nevada Legislature engages in core legislative speech when voting on state legislation. *Id.* at ___, 212 P.3d at 1104-07. Citing *Brady v. Dean,* 173 Vt. 542, 790 A.2d 428 (2001), we held that the Legislature could not delegate to an executive branch agency—the Ethics Commission—the power to police state legislators' conflicts of interests in voting. *Hardy,* 125 Nev. at ___, 212 P.3d at 1105-06. The basis for our decision was not that the First Amendment requires strict scrutiny of conflict-of-interest rules for elected officials who vote. It was that Nevada's constitutional provisions vesting authority in the Legislature to discipline its members, Nev. Const. art. 4, § 6, and mandating separation of powers at the state level, *id.* art. 3, § 1(1), prohibit the Legislature from outsourcing member discipline to an executive branch agency. *Hardy,* 125 Nev. at ___, 212 P.3d at 1108. Only the Legislature, in other words, can discipline its members for legislative speech, including votes violating that body's conflict-of-interest rules.

Hardy doesn't speak to the issue in this case, where a state ethics-in-government statute is being applied to a local governmental official who votes. A local government exercises such powers as the Legislature and Constitution confer. Nev. Const. art. 8, § 8; *see* 2 Eugene McQuillin, *The Law of Municipal Corporations* § 4:5 (3d ed. 2006). A corollary proposition is that, "[u]nless restricted by the constitution, the legislature may prescribe the qualifications, tenure, and duties of municipal officers." 2 McQuillin, *supra,* § 4:124, at 356. While Nevada's separation-of-powers guarantee prohibits the Legislature from outsourcing member discipline

to an executive branch agency, nothing in our Constitution limits the Legislature's authority to subject local governmental officials to state ethics laws administered by the Nevada Ethics Commission. Indeed, the *Brady* decision, on which *Hardy* principally relies, emphasizes that it only addresses state-level legislators and does not call into question conflict-of-interest statutes that apply to local governmental officials. *See Brady*, 790 A.2d at 433 (the "conflict-of-interest cases on which plaintiffs rely all involved elected officials of political subdivisions such as cities and towns which do not raise similar separation-of-power concerns").[2]

First Amendment and acts of governance

An elected official's vote on a matter of public importance is first and foremost an act of governance. The official has broad common law and, at the federal level, Speech and Debate Clause immunity for his vote. *See* S. Sherr, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 Yale L.J. 233, 235-36 (1991) (discussing U.S. Const. art. I, § 6). But thus far the Supreme Court has not overlaid that immunity with First Amendment protection for the act of governance that an official's vote on a public matter represents. *Id.* at 245.

Whether the First Amendment protects an official's vote qua governance was raised but not decided in *Spallone v. United States*, 493 U.S. 265 (1990), an appeal of a contempt order issued against

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[2]Carrigan makes no argument that applying Nevada's ethics laws violates the Nevada Constitution's home-rule provision.

the City of Yonkers and its city council members for not passing an ordinance required by a federal consent decree. Justice Brennan would have upheld the contempt citation against both the City and its council members and reached the First Amendment issue. *Id.* at 281-306 (dissenting). Writing for four members of the Court, he characterized as "unpersuasive" the argument that the First Amendment protected a city council member's vote "yea" or "nay" on the ordinance to which the City had stipulated in the federal consent decree:

> Petitioner Chema claims that his legislative discretion is protected by the First Amendment as well. Characterizing his vote on proposed legislation as core political speech, he contends that the Order infringes his right to communicate with his constituents through his vote. This attempt to recharacterize the common-law legislative immunity doctrine into traditional First Amendment terms is unpersuasive. *While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance* . . . .

Id. at 302 n.12 (emphasis added). *See Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) (en banc) (vacating as moot an earlier panel opinion that held, pre-*Spallone*, that Congress could not, consistent with the First Amendment, coerce the votes of the District of Columbia Council; noting that this was an "important" issue "of first impression" that "would carry broad implications" for federal, state, and local governments and might "open[ ] the door to more litigation than we can now appreciate");

Zilich v. Longo, 34 F.3d 359, 363-64 (6th Cir. 1994) (holding that a former city council member's First Amendment rights were not violated by a resolution authorizing suit against him for having violated the council's residency requirement, even though alleged to be in retaliation for his politics: "Congress frequently conducts committee investigations and adopts resolutions condemning or approving of the conduct of elected and appointed officials, groups, corporations and individuals"; the "manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views," including the plaintiff's "right to oppose the mayor" and the "defendants' right to oppose" the plaintiff "by acting on the residency issue" (internal quotation and citation omitted)); *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009) (dismissing appeal after vacating panel decision, 566 F.3d 515, *reh'g granted*, 576 F.3d 531, that had concluded that elected local and state government officials' decision-making represents political speech, requiring the Texas Open Meeting Act to survive strict scrutiny review); *cf. Doe v. Reed*, 561 U.S. ___, ___ & n.2, 130 S. Ct. 2811, 2817-18, 2820 n.2 (2010) (recognizing that a citizen engages in both expressive and legislative speech in signing a referendum petition and declining strict scrutiny review of Washington's Public Records Act's application to signers who wished to remain anonymous).

Voting by a public official is conduct – an act of governance. Still, as Justice Brennan noted in *Spallone*, a public official's vote also "arguably contains a communicative element," 493 U.S. at 302

n.12; an elected official's vote defines his beliefs and positions in a way words alone cannot. Thus, the First Amendment was held to protect the communicative element in a public official's vote in *Miller v. Town of Hull, Mass.*, 878 F.2d 523 (1st Cir. 1989), on which the majority relies.

Miller was a retaliation case under 42 U.S.C. § 1983. In *Miller*, the First Circuit affirmed a judgment after a jury trial awarding elected members of a town redevelopment authority damages against the board of selectmen who removed them, the jury found, not for a permissible reason but in retaliation for their vote on a housing development for the elderly. 878 F.2d 523. The expressive component of the redevelopment authority members' votes in *Miller* was what was singled out and punished: The board members were retaliated against for *how* they voted, not *because* they voted.

There is a difference the majority does not acknowledge between "'retaliatory First Amendment claims' and 'affirmative' First Amendment claims, such as 'facial challenges to statutes.'" *Velez v. Levy*, 401 F.3d 75, 97 (2d Cir. 2005) (quoting *Greenwich Citizens Comm. v. Counties of Warren*, 77 F.3d 26, 31 (2d Cir. 1996)). Because a First Amendment retaliation claim succeeds does not mean that the right vindicated is absolute, or that a statute that implicates such a right while regulating related conduct in a content-neutral way must pass strict scrutiny to survive facial challenge. First Circuit cases that have followed *Miller* make the point unmistakably. Thus, in *Mullin v. Town of Fairhaven*, 284 F.3d 31, 37 (2002), the First Circuit refined *Miller*, stating that, while "[w]e have extended First

Amendment protection to votes on 'controversial public issue[s]' cast by 'a member of a public agency or board[,]' . . . *[t]his protection is far from absolute.*" *Mullin,* 284 F.3d at 37 (emphasis added) (quoting *Miller,* 878 F.2d at 532). The court then proceeded to analyze Mullin's First Amendment retaliation claim under the flexible *Pickering v. Board of Education,* 391 U.S. 563 (1968), standard the majority rejects—paradoxically, at the same time it embraces *Miller. See also Mihos v. Swift,* 358 F.3d 91, 109 (1st Cir. 2004) ("we articulate the First Amendment right at stake here as the right of a public official to vote on a matter of public concern properly before his agency without suffering retaliation from the appointing authority *for reasons unrelated to legitimate governmental interests*"; applying *Pickering* balancing) (emphasis added).

The *Pickering/Garcetti v. Ceballos,* 547 U.S. 410 (2006), line of cases speaks to the First Amendment rights of public employees and holds that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti,* 547 U.S. at 421. Restricting a public employee's official speech "does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

The majority deems *Pickering/Garcetti* inapplicable because Carrigan is elected and his constituents, not the government, are his ultimate employer with the power to hire or fire him. But this

is an overly simplistic view. It does not take into account the Legislature's control over local governments in our state constitutional scheme and the constitutional and policy-based imperative of non-self-interested governmental decisionmakers, especially in the quasi-adjudicative setting. Even though Carrigan is an elected official, I thus would affirm the district court's ruling that *Pickering/Garcetti* balancing applies to Carrigan's challenge to Nevada's Ethics in Government Act. *See Siefert v. Alexander,* 608 F.3d 974, 985-86 (7th Cir. 2010) (applying *Pickering/Garcetti* balancing, not strict scrutiny, to challenge by judge campaigning for reelection to ethics regulations; rejecting the argument that *Pickering/Garcetti* depends on who can hire or fire the government official and noting that, "It is small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election, especially if that litigant were unable to muster the resources to combat a well-financed, corrupt judge around election time."); *Shields v. Charter Tp. of Comstock,* 617 F. Supp. 2d 606, 615-16 (W.D. Mich. 2009) (applying *Pickering/Garcetti* to elected member of the Township Board and noting that, "[u]nlike an ordinary citizen, [Shields] represents the Township when he speaks at a public board meeting [making] his constitutional rights ... more analogous to the employee in *Garcetti* than to a private citizen sitting in the audience").

Strict scrutiny v. rational basis or intermediate review

Here, Carrigan has not brought a retaliation claim. He challenges whether Nevada's Ethics in Government Law can constitutionally apply to him,

even when the purpose is prophylactic—to avoid conflicts of interest—not retaliatory. Of note, the Law does not regulate *how* councilmember Carrigan votes. It provides that he should not vote at all on "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others." NRS 281A.420(2)(c).[3] Its target is conduct—acts of governance—not personal, expressive speech.

A law limiting an elected official's ability to vote on matters as to which he has an actual or apparent conflict of interest does not trigger strict scrutiny. It commands either rational basis, *Peeper v. Callaway County Ambulance District*, 122 F.3d 619, 622-23 (8th Cir. 1997), or at most the intermediate level of review given laws regulating conduct that incidentally regulate speech, *see Clarke v. United States*, 886 F.2d 404, 413-14 (D.C. Cir. 1989) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc) (alternative holding), as applied in candidate ballot access cases. *Monserrate v. New York State Senate*, 599 F.3d 148 (2d Cir. 2010).

At issue in *Peeper* was a board resolution prohibiting a newly elected ambulance board member from voting on certain matters because her husband worked for the ambulance district. 122 F.3d at 620-

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[3]The Ethics in Government Act was amended in 2009, which resulted in some of its sections being renumbered. Unless otherwise noted, I have followed the majority's convention and refer to the pre-2009 version of the Act in this dissent.

21. Although the Eighth Circuit invalidated parts of the resolution because it went further than the state conflict-of-interest law required, it used rational basis review and rejected strict scrutiny as inappropriate. *Id.* at 622-23. In its view, "[a]n individual's right to be a candidate for public office under the First and Fourteenth Amendments is nearly identical to one's right to hold that office," making it appropriate to "employ the same constitutional test for restrictions on an officeholder as we do for restrictions on candidacy." *Id.* at 622. Quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972), and *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983), *Peeper* noted that the existence of barriers to a candidate's right of access to the ballot does not in and "of itself compel close scrutiny," and stressed that, "[t]he Supreme Court has upheld restrictions on candidacy that are unrelated to First Amendment values and that protect the integrity and reliability of the electoral process itself." 122 F.3d at 622-23. *Accord Franzwa v. City of Hackensack*, 567 F. Supp. 2d 1097 (D. Minn. 2008) (rejecting First Amendment challenge by an elected board member to his temporary suspension by his fellow board members from voting privileges for what they erroneously believed was his disqualification; judged under a rational basis standard, the board, which had the power to judge the qualifications of its members, reasonably believed that the plaintiff's residency qualification was in doubt).

The Second Circuit pursued much the same analysis in *Monserrate v. New York State Senate*, 599 F.3d 148 (2d Cir. 2010), which presented a First Amendment challenge to the New York State

Senate's expulsion of an elected senator following his domestic violence conviction. As the Eighth Circuit did in *Peeper*, the Second Circuit drew on *Anderson v. Celebrezze*, and analogized post-election discipline of elected officials to pre-election candidacy restrictions. *Id.* at 154-55 (also citing *Burdick v. Takushi*, 504 U.S. 428, 432 (1992)). In both the pre- and post-election context, "the rights of voters and the rights of candidates [or elected officials] do not lend themselves to neat separation." *Id.* (internal quotation omitted). The court affirmed that "[t]he district court did not err in declining to apply strict scrutiny," and elaborated that:

> . . . it is an erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Rather, it is useful to look to a more flexible standard in which the rigorousness of our inquiry into the propriety of a state [action] depends upon the extent to which a challenged [action] burdens First and Fourteenth Amendment rights. When such rights are subjected to severe restrictions, the [action] must be narrowly drawn to advance a state interest of compelling importance; but when such rights are subjected to less than severe burdens, the State's important . . . interests are generally sufficient to justify the restrictions. Therefore, if the burden imposed is less than severe and reasonably related to the important state interest, the Constitution is satisfied.

Id. at 154-55 (internal quotations and citations omitted).

"It seems clear enough," the court held, that "this flexible framework, used in ballot access cases, is not limited to the pre-vote context," but applies as well to cases applying post-election restrictions on elected officials. *Id.* at 155. Given the New York Senate's "important interest in upholding its reputation and integrity," and the "reasonab[le] relat[ionship]" between that interest and Monserrate's expulsion, the court denied Monserrate relief.[4] *Id.* at 155-56. In so doing, it noted that the expulsion had the effect of depriving his constituents of elected representation until a successor was chosen. *Id.* at 156. Because the voters of every senate district were likewise subject to having the senate's expulsion rules applied to their

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[4]Had Monserrate been expelled to punish him for *speech* outside the senate as opposed to *conduct*, a different analysis and result would obtain. Thus, in *Bond v. Floyd*, 385 U.S. 116 (1966), the Supreme Court invalidated a state's refusal to seat a federal legislator based on his outspoken opposition to the Selective Service system and the Vietnam war. *Jenevein v. Willing*, 493 F.3d 551 (5th Cir. 2007), cited by the majority to support strict scrutiny review, makes the same point. *Jenevein* involved an elected judge's televised broadcast rebuking a lawyer for improper attacks on the judiciary. *Id.* at 553-57. While the court invalidated part of the censure the judge received based on the judge's First Amendment right to comment publicly on a matter of public interest, it upheld the censure to the extent the judge used his courtroom and robes to stage his broadcast. *Id.* at 560-61. The judge's First Amendment right to speak out on a matter of public concern that involved him did not give him the right to use his courtroom as a pulpit. Of note, the Seventh Circuit rejected *Jenevein*'s strict scrutiny approach in favor of the more capacious *Pickering/Garcetti* standard, which accommodates both the public interest in unbiased judicial officers and the individual elected officer's First Amendment interests. *Siefert*, 608 F.3d at 984-86.

elected representative, this did not offend their First or Fourteenth Amendment rights. *Id.* at 156-57.

No doubt requiring Carrigan to recuse himself on matters involving his longtime friend and then-current campaign manager, Vasquez cost Vasquez, his other clients, and others of Carrigan's constituents their representation by Carrigan, and deprived Carrigan of his right to express himself by voting on matters involving Vasquez or Vasquez's lobbying clients. Applying Monserrate's "flexible framework," however, the burden is justified.

Statutorily imposed limits on a local government official's vote on a matter as to which his personal loyalties conflict, or appear to conflict, with his public duties do not severely or discriminatorily burden the official or his constituents. A public official, under Nevada's Ethics in Government Law, is not required to recuse so long as the official's "commitment in a private capacity to the interest of others . . . is not greater than that accruing to any other member of the general business, profession, occupation or group." NRS 281A.420(2)(c). It is only when, as the Commission found here, "the independence of judgment of a reasonable person in [the public officer's] situation would be materially affected by . . . his commitment in a private capacity to the interests of others" that recusal is required. *Id.* Even then, the official "may otherwise participate in the consideration of [the] matter," NRS 281A.420(2); he just may not vote on or advocate the passage or defeat of the matter in which he has a disqualifying personal interest. At least in the adjudicative setting, moreover, recusal is the preferred, more narrowly tailored way to avoid corruption or the appearance of

corruption. *Citizens United v. Federal Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 910 (2010) (discussing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, 129 S. Ct. 2252 (2009), as "limited to the rule that the judge must be recused, not that the litigant's political speech could be banned"); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (noting that, in the adjudicative context, a state "may adopt recusal standards [for its elected judges] more rigorous than due process requires").[5]

The justification for requiring recusal in matters involving conflicts of interest on the part of elected public officials is strong. The Legislature passed

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[5]Acknowledging the difficult balance between constituents' rights to public representation and personal interests giving rise to disqualifying conflicts of interest, the 2009 Legislature added the following paragraph to NRS 281A.420:

> Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this [statute] are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's . . . commitment in a private capacity to the interests of others. NRS 281A.420(4)(b) (2009).

This clarifying language was not part of NRS 281A.420 when Carrigan voted on the Lazy 8 matter and the Commission and the district court considered whether he violated the statute in his vote. Even accepting arguendo that strict scrutiny applies, the passage of this amendment militates against the overbreadth analysis the majority pursues and suggests the more prudent course would be to analyze this appeal on an as-applied basis.

Nevada's Ethics in Government Law "[t]o enhance the people's faith in the integrity and impartiality of public officers and employees [by establishing] appropriate separation between the roles of persons who are both public servants and private citizens." NRS 281A.020(2)(b). In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court upheld statutory limits on citizens' direct candidate contributions in order to ensure "against the reality or appearance of corruption" of elected officials—deeming the government's interest in preventing actual or perceived quid pro quo corruption of elected officials sufficient to justify the undeniable incursion on private citizens' First Amendment rights such contribution limits represent. In *Citizens United,* 558 U.S. at ___, 130 S. Ct. at 908, the Supreme Court reaffirmed *Buckley.* If the government's interest in "ensur[ing] against the reality or appearance of corruption," *Citizens United,* 558 U.S. at ___, 130 S. Ct. at 908, can justify the direct contribution limits upheld in *Buckley,* Nevada's concern with local government official's actual or apparent conflicts of interest surely justifies the limited disqualification stated in NRS 281A.420(2)(c).

At common law, "[a] member of a local governing board is deemed to be a trustee for the citizens of the local entity." 2 *Antieau on Local Government Law* § 25.08[1] (2009). In such an official, "[t]he law tolerates no mingling of self-interest. It demands exclusive loyalty, and if a local legislator has an interest that is of such personal importance that it impairs his or her capacity to act in the interest of the public, he or she cannot vote." *Id.* Numerous cases so hold, applying long-established common law.

See 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 126 (2010) ("A council member who has a direct personal interest, a financial interest, or an appearance of impropriety in a matter coming before the council is not eligible to vote in that matter on the grounds that to allow such a practice violates public policy. The proper thing to do in such a case is for the member to recuse or disqualify himself, or abstain from voting.") (footnotes omitted; collecting cases dating back as far as 1878). Statutes regulating conflicts of interest by public officials supplement these common law rules, both in Nevada and elsewhere. *See* M. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking,* 65 N.D. L.Rev. 161, 175-79 (1989).

"A 'universal and long-established' tradition of prohibiting certain conduct creates 'a strong presumption' that the prohibition is constitutional." *Republican Party of Minn.*, 536 U.S. at 785 (quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 375-77 (1995) (Scalia, J., dissenting)). I submit that this presumption applies here.

Overbreadth

Carrigan does not contest the Ethics Commission's findings, which the district court upheld, that Carrigan's relationship with Vasquez was disqualifying.[6] Nor does the majority debate that,

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[6]Carrigan was in the final weeks of a contested reelection when he voted on the Lazy 8 matter. His campaign manager, fund raiser and longtime political adviser was Carlos Vasquez, whose lobbying client was the Lazy 8 on whose application Carrigan voted. The Commission found:

as applied, NRS 281A.420(2) and (8) legitimately required Carrigan to abstain from voting on the Lazy 8 matter. Majority opinion *ante* at 620 n.5. Nonetheless, Carrigan wins reversal because the majority concludes that, since strict scrutiny applies, so does the overbreadth doctrine, and that NRS 281A.420(8)(e), read in isolation from the rest of the statute to which it relates, is unconstitutionally overbroad. With this conclusion I cannot agree.

Overbreadth analysis is an exception to the basic rule that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v.*

> A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant, and campaign manager [Vasquez], who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

As the district court noted, the legislative history of NRS 281A.420 supports the Ethics Commission's finding that this relationship was disqualifying. *See* Hearing on S.B. 478 Before Senate Comm. on Gov't Affairs, 70th Leg. (Nev., March 30, 1999) (while a prior campaign association would not necessarily be disqualifying, if the relationship "was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person").

Oklahoma, 413 U.S. 601, 610 (1973). The rule against hypothetical challenges rests "on more than the fussiness of judges"; it "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 610-11. As an exception to the rule against deciding cases based on hypotheticals, the overbreadth doctrine is strictly limited. It applies only to "statutes which, by their terms, seek to regulate only spoken words," burden "innocent associations," or delegate "standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints." *Id.* at 612-13 (internal quotation omitted).

In *Broadrick*, the Court rejected an overbreadth challenge by Oklahoma government employees to a state personnel statute patterned on the federal Hatch Act, which proscribes partisan political activities by government employees. Concededly, the Act's broad terms could be read to prohibit some constitutionally protected speech. However, it fairly applied to the conduct engaged in by the employees before the Court. Since the statute sought "to regulate political activity in an even-handed and neutral manner" and reached "a substantial spectrum of conduct that [was] manifestly subject to state regulation," the government employees' overbreadth challenge failed. *Id.* at 616. In reaching this conclusion, the Court cautioned against too easy or promiscuous resort to overbreadth analysis in conduct cases. The function of

> facial overbreadth adjudication . . . attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure

> speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid . . . laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id. at 615.

Broadrick disposes of Carrigan's overbreadth challenge. Here, the challenged statute applies to conduct: the governmental act of voting on a local land use matter. Even granting that an elected official's vote on a public matter carries an element of expressive speech, the statute is content-neutral. It regulates *when* an official may or may not vote, not *how* he or she should vote. Its justification lies in avoiding corruption or the appearance of corruption and in promoting the public's faith in the integrity of its local government. Such a statute, applying in a content-neutral way to both conduct and speech in the government setting, should not fall to overbreadth analysis.

The majority does not identify the protected conduct that NRS 281A.420(8)(e)'s declared overbreadth improperly catches in its sweep. *But see United States v. Stevens*, 559 U.S. ___, ___, 130 S. Ct. 1577, 1587 (2010) ("[t]he first step in overbreadth

analysis is to construe the challenged statute" preparatory to deciding whether "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep") (quotations and citations omitted). Instead, the majority offers the *ipse dixit* that "[t]he definition of a 'commitment in a private capacity' in subsection 8(e) fails to sufficiently describe what relationships are included within NRS 281A.420(2)(c)'s restriction. As a result, the statute's reach is substantially overbroad." Majority opinion *ante* p. 623.[7]

Read in isolation and parsed word-for-word, paragraph (e) of NRS 281A.420(8) can be seen as imprecise. But it is not free-standing. It refers to the rest of NRS 281A.420, which explains when disqualification is required (situations in which "the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others," NRS 281A.280(2)); identifies the types of

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[7]This statement seems more appropriate to a void-for-vagueness than an overbreadth challenge but Carrigan does not have a legitimate vagueness challenge. The Ethics Commission is available to rule in advance on whether a disqualifying conflict of interest exists; Carrigan admits he had six months lead time before the Lazy 8 application came to a vote; his sanction was a civil rebuke, not a criminal penalty. He thus cannot prevail on a void-for-vagueness challenge. *Compare Holder v. Humanitarian Law Project*, 561 U.S. ___, ___, 130 S. Ct. 2705, 2719 (2010) ("a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim . . . for lack of notice"), *with Broadrick*, 413 U.S. at 608 n.7 (rejecting the government employees' vagueness challenge to lack of notice given that there was a review board available, as here, to rule in advance on the permissibility of their proposed conduct).

relationships that are disqualifying (household, family, employment, or business, NRS 281A.280(8)(a)-(d)); and then, under those headings, provides for disqualification based on "[a]ny other commitment or relationship that is substantially similar" to those listed, NRS 281A.420(8). Given the long common law history disqualifying local officials from voting on matters as to which they have conflicts of interest—and the elusive nature of conflicts of interest—the statute could have ended with the general proscription in NRS 281A.420(2) and passed muster. *Cf.* 2 Antieau, *supra,* § 25.08[1], at 25-47 ("The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case. No definitive test has been devised."). Stating a general rule, followed by a list that ends with a catchall, does not make a statute unconstitutionally overbroad:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973); *see* 2A Norman A. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:17, at 358-60 (2007) ("Where general words follow specific words in a statutory enumeration, the general words are

construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words," thus inherently limiting the statute's terms).

* * * * *

The vote in this case did not signify much in the end, because Carrigan's vote was in the minority. But applying First Amendment strict scrutiny and overbreadth precepts to invalidate state conflicts-of-interest laws that govern local governmental officials who vote is a mistake that I fear opens the door to much litigation and little good.

Appendix B

Nevada District Court Opinion

Case No.: 07-OC-012451B

Dept. No.: II

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

MICHAEL A. CARRIGAN, Fourth City Ward Council of the City of Sparks, Petitioner, vs. THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, Respondent.	ORDER AND JUDGMENT DENYING THE PETITIONER'S PETITION FOR JUDICIAL REVIEW AND AFFIRMING THE FINAL DECISION OF THE NEVADA COMMISSION ON ETHICS

PROCEDURAL HISTORY

On October 9, 2007, Petitioner MICHAEL A. CARRIGAN, a member of the Sparks City Council, filed a Petition for Judicial Review pursuant to the Administrative Procedure Act (NRS 233B.130-233B.135) asking the Court to reverse a final decision of Respondent NEVADA COMMISSION ON ETHICS (Commission). In the Commission's final decision, which it issued on October 8, 2007, the Commission

found that Councilman Carrigan violated the Nevada Ethics in Government Law (Ethics Law) when he failed to abstain from voting upon the application of Red Hawk Land Company (Red Hawk) for tentative approval of its Lazy 8 resort and casino project (Lazy 8 project). Specifically, the Commission determined that, at the time of the vote, Councilman Carrigan had a disqualifying conflict of interest under subsections 2 and 8 of NRS 281A.420 because his campaign manager, political advisor, confidant and close personal friend, Mr. Carlos Vasquez, was a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the Lazy 8 project.[1]

In support of his Petition for Judicial Review, Councilman Carrigan filed an Opening Brief on January 7, 2008. The Commission filed an Answering Brief on February 25, 2008. In addition, on February 25, 2008, the Legislature of the State of Nevada (Legislature) filed a Motion for Leave to File an Amicus Curiae Brief and for Permission to Participate as Amicus Curiae in any Oral Argument or Hearing on this matter. The Legislature

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[1]At the time of the City Council meeting on August 23, 2006, the Ethics Law was codified in NRS 281.411-281.581. In 2007, the Legislature enacted Senate Bill No. 495, which directed the Legislative Counsel to move the Ethics Law into a new chapter to be numbered as NRS Chapter 281A. See, Ch. 195, 2007 Nev. Stats. 641, § 18. Because the relevant events in this case occurred before the recodification of the Ethics Law into NRS Chapter 281A, the Commission's final decision and the briefs of the parties cite to NRS 281.411-281.581. Nevertheless, for purposes of consistency with the Ethics Law as presently codified, the Court's order and judgment will cite to the appropriate provisions of NRS Chapter 281A.

conditionally filed its Amicus Curiae Brief along with its Motion. The Amicus Curiae Brief was limited to addressing Councilman Carrigan's claims that subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of the First and Fourteenth Amendments. On March 20, 2008, the Court granted the Legislature's Motion and permitted the Legislature to file its Amicus Curiae Brief and to participate as Amicus Curiae in any oral argument or hearing on this matter.

On March 26, 2008, Councilman Carrigan filed a Reply Brief and also filed a Request for Hearing on this matter pursuant to NRS 233B.133(4). On April 16, 2008, the Court set a hearing date of May 12, 2008, to receive oral argument from the parties and Amicus Curiae regarding the Petition.

On May 12, 2008, the Court commenced the hearing on the Petition shortly after 9:00 a.m. in the courtroom of Department No. II. The following counsel were present in the courtroom: CHESTER H. ADAMS, Sparks City Attorney, and DOUGLAS R. THORNLEY, Assistant City Attorney, who appeared on behalf of the Petitioner; ADRIANA G. FRALICK, General Counsel for the Nevada Commission on Ethics, who appeared on behalf of the Respondent; and KEVIN C. POWERS, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, who appeared on behalf of the Legislature as Amicus Curiae.

Having considered the pleadings, briefs, documents, exhibits and administrative record on file in this case and having received oral argument from the parties and Amicus Curiae, the Court enters the following findings of fact and conclusions of law pursuant to N.R.C.P. 52 and enters the following order and judgment pursuant to N.R.C.P. 58 and NRS 233B.135:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Michael A. Carrigan is the Petitioner herein. He is a member of the Sparks City Council.

2. The Nevada Commission on Ethics is the Respondent herein. The Commission is charged with the statutory duty of administering and enforcing the Ethics Law, which is codified in the Nevada Revised Statutes as NRS Chapter 281A.

3. On August 23, 2006, the Sparks City Council held a special meeting to determine whether to grant Red Hawk tentative approval for its Lazy 8 project, which would be built within a planned development in the City commonly known as Tierra Del Sol. (ROA000002-4, 170-171, 176-209.)[2] All five members of the City Council were present at the meeting and actively participated in the discussion regarding the merits of Red Hawk's application. (ROA000175, 202-209.)

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[2]Parenthetical citations are to the Administrative Record on Appeal (ROA), which the Commission transmitted to the Court pursuant to NRS 233B.131(1) and which consists of Bates Pages Nos. ROA000001 to ROA000570, inclusive.

4. At the time of the meeting, Councilman Carrigan was a candidate for reelection to a third term on the City Council, and Mr. Carlos Vasquez was his campaign manager. (ROA000002-4, 23, 43-44.) Vasquez started serving as campaign manager in January or February 2006, and he served in that capacity until Councilman Carrigan was reelected at the November 2006 general election. Id. In prior elections, Vasquez served as Councilman Carrigan's campaign manager for at least 3 months in both 1999 and 2003, when Councilman Carrigan was elected to his first and second terms on the City Council. (ROA000002-4, 21-23.) Vasquez and Councilman Carrigan also have a close personal friendship that has been ongoing since 1991. (ROA000002-4, 20-21, 41.)

5. Vasquez has served as campaign manager for at least 50 to 60 candidates since 1999. (ROA000041.) For some candidates, Vasquez was paid compensation for his services as campaign manager, but for Councilman Carrigan's three consecutive campaigns, Vasquez was not paid compensation. (ROA000002-4, 21-23, 41.) However, several companies owned by Vasquez were paid for providing printing, advertising and public relations services for Councilman Carrigan's three campaigns. (ROA000002-4, 24, 33-34, 51.) These services were provided at cost, and Vasquez and his companies did not make any profit from these services. Id.

6. Councilman Carrigan would routinely discuss political matters with Vasquez throughout his terms in office, not just during political campaigns, and he considered Vasquez to be a trusted political advisor and confidant. (ROA000022-23, 25, 31, 35.) In fact,

Councilman Carrigan would confide in Vasquez regarding political matters that he would not normally discuss with members of his own family such as siblings. (ROA000035.) When Vasquez was asked by the Commission to describe the kind of political matters he discussed with Councilman Carrigan from 1999 to 2006, he responded: "Everything. When you are running a campaign you have to take a look at all the factors that could affect that candidate and that community." (ROA000046.)

7. During Councilman Carrigan's 2006 reelection campaign, the predominant campaign issue was the Lazy 8 project, and the public and the media focused most of their attention on that project. (ROA000023-24, 47.) As campaign manager, Vasquez actively solicited campaign contributions for the benefit of Councilman Carrigan. (ROA000043-44.) As part of that solicitation, Vasquez relied on his many community and business contacts, and he sent fund-raising letters to approximately 700 potential donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were otherwise directly interested in the success of the Lazy 8 project. Id.

8. Vasquez's primary occupation is to act as a paid public relations political advocate and strategist. (ROA000042.) In that capacity, Vasquez is paid to provide political consulting, lobbying and public relations services, and one of his specialties is providing such services to developers who are seeking approval from local governments for their planned developments. (ROA000041-53.)

9. Vasquez was hired by Red Hawk or one of its affiliates to provide political consulting, lobbying and public relations services for the Lazy 8 project. (ROA000029, 42.) Vasquez was paid to oversee public relations regarding the project, and he was actively and openly involved in efforts to manage information in the media and to influence and improve the public's opinion regarding the project. (ROA000042-46.) Vasquez also was actively and openly involved in efforts to secure the City Council's approval of the project. Id.

10. Councilman Carrigan testified before the Commission that Vasquez never asked him to vote a particular way on the Lazy 8 project. (ROA000035-37, 42-46.) However, the record reflects that Vasquez's efforts were instrumental in securing support for the project from Councilman Carrigan. Id. For example, Vasquez met numerous times with Councilman Carrigan and other council members to discuss the project. At those meetings, Vasquez sought support for the project through discussions and negotiations regarding the specific details of the project that Red Hawk could change to satisfy the concerns of the council members. Id. As a result of his discussions and negotiations, Vasquez conveyed information directly to Red Hawk, which then changed the specifications of the project to obtain the support of Councilman Carrigan and other council members. Id.

11. At the beginning of the City Council meeting on August 23, 2006, Councilman Carrigan made the following disclosure, as found in the transcripts of the meeting:

> Thank you Mayor. I have to disclose for the record something, uh, I'd like to disclose that Carlos Vasquez, a consultant for Redhawk, uh, Land Company is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight. [T]herefore according to NRS 281.501 [now codified as NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue. Thank you.
>
> (ROA000507.)

12. At the City Council meeting, Vasquez appeared and testified as a paid consultant and representative for Red Hawk, and he actively and openly lobbied and advocated on behalf of Red Hawk and urged the City Council to approve the Lazy 8 project. (ROA000187-190.)

13. After receiving additional testimony at the meeting from supporters and opponents of the Lazy 8 project, the City Council took action on Red Hawk's application. (ROA000190-209.) Councilman Carrigan made a motion to grant tentative approval for the Lazy 8 project. (ROA000206- 209.) That motion failed by a vote of two in favor (Carrigan and Schmitt) and three opposed (Mayer, Salerno and Moss). Id. Councilman Mayer then made a motion to deny tentative approval for the Lazy 8 project. (ROA000209.) That motion passed by a vote of three in favor (Mayer, Salerno and Moss) and two opposed (Carrigan and Schmitt). Id.

14. In September 2006, four members of the public filed separate but similar ethics complaints against Councilman Carrigan. (ROA000075-107.) Each complaint alleged that Councilman Carrigan's participation in the City Council meeting violated the Ethics Law because, at the time of the meeting, Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend was acting as a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the Lazy 8 project. Id.

15. On August 29, 2007, the Commission held a hearing and received testimony and evidence concerning the ethics complaints. (ROA000016-71.) On October 8, 2007, the Commission issued its final decision finding that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted upon the Lazy 8 project. (ROA000001-13.) However, because the Commission found that Councilman Carrigan's violation was not willful, the Commission did not impose a civil penalty against Councilman Carrigan. (ROA000012-13.)

16. Subsection 2 of NRS 281A.420 provides in relevant part:

> [I]n addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
>
> (a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

17. In its final decision, the Commission determined that when Councilman Carrigan voted upon the Lazy 8 project, Councilman Carrigan improperly voted upon "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by ... [h]is commitment in a private capacity to the interests of others." NRS 281A.420(2)(c). (ROA000011-13.)

18. In reaching its conclusion, the Commission relied upon the statutory definition of "commitment in a private capacity to the interests of others," which is found in subsection 8 of NRS 281A.420:

> 8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:
>
> (a) Who is a member of his household;
>
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
>
> (c) Who employs him or a member of his household;
>
> (d) With whom he has a substantial and continuing business relationship; or
>
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

(Emphasis added.) (ROA000006-8.)

19. The Commission found that Councilman Carrigan's relationship with Vasquez came within the scope of paragraph (e) of subsection 8 of NRS 281A.420, as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." (ROA000006-8.) In particular, the Commission determined that "[t]he sum total of their commitment and relationship equates to a 'substantially similar' relationship to those enumerated under NRS 281.501(8)(a)-(d) [now codified as NRS 281A.420(8)(a)-(d)], including a close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" (ROA000008.)

20. Because the Commission found that the independence of judgment of a reasonable person in Councilman Carrigan's situation would be materially affected by his commitment in a private capacity to the interests of his campaign manager, political advisor, confidant and close personal friend, the Commission concluded that Councilman Carrigan was required by subsection 2 of NRS 281A.420 to abstain from voting. Specifically, the Commission stated:

> Under the Woodbury analysis, the burden was appropriately on Councilman Carrigan to make a determination regarding abstention. Abstention is required where a reason-able person's independence of judgment would be materially affected by his private commitment.
>
> A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant and campaign manager, who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

(ROA000012.)

Petitioner's Claims

21. In his Petition for Judicial Review, Councilman Carrigan raises multiple claims challenging the Commission's final decision.

22. First, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is in violation of constitutional provisions. NRS 233B.135(3)(a). Specifically, Councilman Carrigan contends that subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of the First and Fourteenth Amendments.

23. Second, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is affected by error of law. NRS 23313.135(3)(d). Specifically, Councilman Carrigan contends that the Commission improperly interpreted and applied subsection 2 of NRS 281A.420 because it ignored the presumption contained in that subsection without receiving any evidence that rebutted the presumption.

24. Third, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is not supported by reliable, probative and substantial evidence on the whole record. NRS 233B.135(3)(e).

25. Fourth, Councilman Carrigan contends that the Commission's final decision should be reversed

under the Administrative Procedure Act because the final decision is arbitrary and capricious and characterized by abuse of discretion. NRS 233B.135(3)(f).

26. Finally, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision violates his constitutional rights to due process and was made upon unlawful procedure. NRS 233B.135(3)(a) & (c). Specifically, Councilman Carrigan contends that his constitutional rights to due process were violated because Commissioner Flangas and Commissioner Hsu each had conflicts of interest which created an appearance or implied probability of bias and which disqualified them from participating in the Commission's hearing regarding the ethics complaints against Councilman Carrigan.

27. Having reviewed each of Councilman Carrigan's claims, the Court finds that the claims do not have merit and, therefore, the Court denies the Petition for Judicial Review and affirms the final decision of the Commission pursuant to NRS 233B.135(3).

Standard of Review

28. Under the Administrative Procedure Act, Councilman Carrigan bears the burden of proof to show that the final decision of the Commission is invalid. NRS 233B.135(2); Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 498 (2005). To meet his burden of proof, Councilman Carrigan must prove that substantial rights have been prejudiced by the final decision of the Commission because the final decision is:

> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) Arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3).

29. In reviewing the final decision of the Commission, the standard of deference accorded to the Commission's determinations turns largely on whether the determinations are more appropriately characterized as findings of fact or conclusions of law. S. Nev. Operating Eng'rs v. Labor Comm'r, 121 Nev. 523, 527 (2005).

30. The Commission's findings of fact are entitled to a deferential standard of review. Id. at 527-28.

Under that deferential standard, the Court may not look beyond the administrative record or substitute its judgment for that of the Commission as to the weight of evidence on any findings of fact. NRS 233B.135(3); Weaver, 121 Nev. at 498. Thus, the Court must uphold the Commission's findings of fact if they are supported by substantial evidence in the record, regardless of whether the Court would have reached the same view of the facts as the Commission. Wright v. State. Dep't of Motor Vehicles, 121 Nev. 122, 125 (2005). For purposes of this standard, substantial evidence is defined as evidence which a reasonable mind might accept as adequate to support a conclusion. Id. Substantial evidence need not be voluminous, and it may be shown inferentially by a lack of certain evidence. Id.

31. In addition to giving deference to the Commission's findings of fact, the Court must give deference to the Commission's conclusions of law when they are closely tied to the Commission's view of the facts. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005). However, on pure questions of law, such as the Commission's interpretation of the ethics statutes, the Court is empowered to undertake an independent de novo review, and the Court is not required to defer to the Commission's legal conclusions. Bacher v. State Eng'r, 122 Nev. ---, 146 P.3d 793, 798 (2006); Nev. Tax Comm'n v. Nev. Cement Co., 117 Nev. 960, 964 (2001).

32. Under NRS Chapter 281A, the Commission is the agency expressly charged with the statutory duty of administering and enforcing the ethics statutes. NRS 281A.440 & 281A.480; Comm'n on Ethics v. JMA/Lucchesi, 110 Nev. 1, 5-6 (1994). As a result, the

Commission is clothed with the power to interpret the ethics statutes as a necessary precedent to its administrative action and "great deference should be given to that interpretation if it is within the language of the statute." Nev. Tax Comm'n, 117 Nev. at 968-69; JMA/Lucchesi, 110 Nev. at 5-6; Cable v. State ex rel. Employers Ins. Co., 122 Nev. ---, 127 P.3d 528, 532 (2006). Thus, the Court will give great deference to the Commission's interpretation of the ethics statutes and will not readily disturb that interpretation if it is within the *language of the statutes and is consistent* with *legislative intent.* JMA/Lucchesi, 110 Nev. at 5-7; City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900 (2002).

Subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment.

33. Councilman Carrigan contends that legislative voting is protected speech under the First Amendment and that he had a constitutional right as an elected public officer to engage in such protected speech when he voted on the Lazy 8 project. Because the Commission concluded that subsections 2 and 8 of NRS 281A.420 prohibited Councilman Carrigan from voting on the Lazy 8 project, Councilman Carrigan argues that the statutory provisions are unconstitutional on their face and as applied to him because they impermissibly restrict his protected speech in violation of the First Amendment. In response, the Legislature raises several arguments in opposition to Councilman Carrigan's constitutional challenge to the validity of the statutory provisions.

34. First, the Legislature contends that the First Amendment was not applicable under the circumstances that existed when Councilman Carrigan voted on the Lazy 8 project. Specifically, the Legislature argues that: (1) the City Council meeting regarding the Lazy 8 project was not a legislative proceeding, but was an administrative proceeding at which the City Council and its members were required to comply with the Due Process Clause; (2) under the Due Process Clause, Councilman Carrigan was prohibited from voting on the Lazy 8 project because he had a substantial and continuing political, professional and personal relationship with Vasquez which created an appearance or implied probability of bias and which resulted in a disqualifying conflict of interest; and (3) because the Due Process Clause prohibited Councilman Carrigan from voting on the Lazy 8 project, the First Amendment was not applicable under the circumstances and, therefore, subsections 2 and 8 of NRS 281A.420 are not subject to review under the First Amendment based on the particular facts of this case.

35. Second, the Legislature contends that even if subsections 2 and 8 of NRS 281A.420 are subject to review under the First Amendment in this case, the balancing test established by the United States Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968), is the proper standard of review. The Legislature argues that under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan because the state's vital interest in ethical government outweighs any interest

Councilman Carrigan has to vote upon a matter in which he has a disqualifying conflict of interest.

36. Finally, the Legislature contends that even if strict scrutiny is the proper standard of review under the First Amendment, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan because: (1) the state has a compelling interest in promoting ethical government and guarding the public from biased decisionmakers; and (2) the statutory provisions requiring disqualified public officers to abstain from voting constitute the least restrictive means available to further the state's compelling interest.

37. Although the Legislature makes a cogent argument that the First Amendment was not applicable under the circumstances, it is not necessary for the Court to resolve that issue in this case. Instead, even assuming that the First Amendment was applicable under the circumstances, the Court finds that under the Pickering balancing test, any interference with protected speech is warranted because of the state's strong interest in either having ethical government or the appearance of ethical government. Therefore, the Court holds that subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan.

38. Although public officers and employees do not surrender their First Amendment rights as a result of their public service, it is well established that the free speech and associational rights of public officers and employees are not absolute. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567

(1973). Because the free speech and associational rights of public officers and employees are not absolute, states may enact reasonable regulations limiting the political activities of public officers and employees without violating the First Amendment. Clement v. Fashing, 457 U.S. 957, 971-73 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 606-07 (1973).

39. Several cases from the First Circuit have found that "[v]oting by members of municipal boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the status of public officials' votes as constitutionally protected speech [is] established beyond peradventure of doubt." Stella v. Kelley, 63 F.3d 71, 75 (1st Cir. 1995); Mihos v. Swift, 358 F.3d 91, 107-09 (1st Cir. 2004); Miller v. Town of Hull, 878 F.2d 523, 532-33 (1st Cir. 1989). Even though the First Circuit recognizes that voting by public officers is constitutionally protected speech, the First Circuit also recognizes that "Mills protection is far from absolute," and that when a public officer claims his First Amendment right to vote has been violated, the Pickering balancing test is the proper standard of review to apply to the case. Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002); Stella, 63 F.3d at 7476; Mihos, 358 F.3d at 102-09. As thoroughly explained by the First Circuit in Mullin:

> We have extended First Amendment protection to votes on "controversial public issues" cast by "a member of a public agency or board." Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir. 1989) ("There can be no more definite expression of opinion than by voting on a controversial public issue."); see also Stella v.

> Kelley, 63 F.3d 71, 75-76 (1st Cir. 1995). This protection is far from absolute, however. In their capacity as public officials voting on matters of public concern, plaintiffs retain First Amendment protection "so long as [their] speech does not unduly impede the government's interest . . . in the efficient performance of the public service it delivers through" its pointed officials. O'Connor, 994 F.2d at 912 (citing cases). Accordingly, to determine the scope of First Amendment free speech protections applicable to public officials, we have employed a three-part test extracted largely from two Supreme Court opinions, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), and Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

Mullin, 284 F.3d at 37.

40. Thus, the Court finds that the Pickering balancing test, not strict scrutiny, is the proper standard of review for this case. Under the Pickering balancing test, the Court must weigh the interests of public officers and employees in exercising their First Amendment rights against the state's vital interest in "promot[ing] efficiency and integrity in the discharge of official duties." Connick v. Myers, 461 U.S. 138, 150-51 (1983) (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)); Rankin v. McPherson, 483 U.S. 378, 384 (1987). If a public officer or employee engages in protected speech that has the potential to disrupt or undermine the efficiency or integrity of governmental functions, the state may impose significant restraints on the speech that "would be plainly unconstitutional if applied to the public at large." United States v.

Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995); Waters v. Churchill, 511 U.S. 661, 671-75 (1994) (plurality opinion). Thus, under the Pickering balancing test, the state is given greater latitude to restrict the speech of public officers and employees to promote operational efficiency and effectiveness and to prevent the appearance of impropriety and corruption in the performance of governmental functions. City of San Diego v. Roe, 543 U.S. 77, 80-85 (2004); Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 1958-59 (2006).

41. On their face, subsections 2 and 8 of NRS 281A.420 prohibit a public officer from voting upon a matter when he has a "commitment in a private capacity to the interests of others." The purpose of the statutory provisions is to prevent a public officer from voting upon a matter when private interests create an actual conflict of interest or the appearance of a conflict of interest. Under such circumstances, a reasonable person would have a legitimate fear that the public officer's commitment to the private interests of others could potentially disrupt or undermine the public officer's efficiency, effectiveness and integrity in the discharge of his official duties. Thus, on their face, the statutory provisions serve the vital state interest of securing the efficient, effective and ethical performance of governmental functions. See Dunphy v. Sheehan, 92 Nev. 259, 262 (1976) ("The elimination and prevention of conflict of interest is a proper state purpose.").

42. Because the statutory provisions serve such a vital state interest, the balancing of interests under the Pickering test tilts heavily in favor of the state because the state's interests are at their zenith. In

contrast, a public officer's interest in voting upon a matter in which he has a disqualifying conflict of interest is entitled to little or not protection under the First Amendment. Indeed, allowing a public officer to vote under such circumstances would seriously erode the public's confidence in ethical government. Therefore, because the state's interest in securing the efficient, effective and ethical performance of governmental functions outweighs any interest that a public officer may have in voting upon a matter in which he has a disqualifying conflict of interest, the Court finds that subsections 2 and 8 of NRS 281A.420 are facially constitutional under the Pickering balancing test.

43. The Court also finds that subsections 2 and 8 of NRS 281A.420 are constitutional as applied to Councilman Carrigan. Given Vasquez's role as Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend, the record contains substantial evidence that Councilman Carrigan and Vasquez had a substantial and continuing political, professional and personal relationship when the Lazy 8 project came before the City Council for approval. That relationship was sufficient to create an actual conflict of interest or the appearance of a conflict of interest, and a reasonable person would have had a legitimate fear that the relationship could potentially disrupt or undermine Councilman Carrigan's efficiency, effectiveness and integrity in the discharge of his official duties. Under such circumstances, Councilman Carrigan had a disqualifying conflict of interest. Because the First. Amendment does not protect the right to vote in the face of a disqualifying conflict of interest, the

Commission acted constitutionally when it found that Councilman Carrigan was prohibited from voting upon the Lazy 8 project.

44. Accordingly, the Court holds that under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan. Therefore, subsections 2 and 8 of NRS 281 A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment.

Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments.

45. Overbreadth and vagueness are "logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358n.8 (1983). A statute is unconstitutionally overbroad on its face if the statute prohibits a substantial amount of speech protected by the First Amendment. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-97 (1982). A statute is unconstitutionally vague on its face if the statute: (1) fails to provide people of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits, or (2) authorizes or encourages arbitrary and discriminatory enforcement by the officers charged with its administration. Id. at 497-99; Comm'n on Ethics v. Ballard, 120 Nev. 862, 868 (2004).

46. In determining whether a statute is unconstitutionally overbroad or vague, the United States Supreme Court considers whether there are any procedures in place allowing persons with doubts

about the meaning of the statute to obtain clarification from the agency charged with its enforcement. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 608 n.7 (1973); Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (plurality opinion); Hoffman Estates, 455 U.S. at 498; cf. Dunphy v. Sheehan, 92 Nev. 259, 264 (1976). The Supreme Court typically will not find the statute to be unconstitutionally overbroad or vague if such persons "are able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the meaning of the law.'" McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (citation omitted) (quoting Letter Carriers, 413 U.S. at 580); Groener v. Or. Gov't Ethics Comm'n, 651 P.2d 736, 742-43 (Or. Ct. App. 1982).

47. Under the Ethics Law, a public officer may request an advisory opinion from the Commission regarding "the propriety of his own past, present or future conduct" and receive guidance from the Commission on whether to withdraw or abstain from participating in a matter. NRS 281A.440(1) & 281A.460. Each request so made by a public officer and each advisory opinion rendered by the Commission in response to such a request, and any motion, determination, evidence or hearing record relating to such a request, are confidential unless the public officer who requested the advisory opinion permits the disclosure of the confidential information or acts in contravention of the advisory opinion. NRS 281A.440(5).

48. In this case, Councilman Carrigan failed to seek an advisory opinion from the Commission even

though he had ample time and opportunity to do so. The record shows that Vasquez became Councilman Carrigan's campaign manager 6 months or more before the City Council meeting. (ROA000023.) During that period, Councilman Carrigan had actual knowledge of Vasquez's simultaneous service as a paid consultant for Red Hawk regarding the Lazy 8 project. (ROA000029, 42-43.) Thus, Councilman Carrigan could have requested an advisory opinion from the Commission during this period, but he neglected to do so. Given that Councilman Carrigan failed to seek an advisory opinion and obtain clarification of the statute from the Commission when he had ample opportunity to do so, the Court rejects Councilman Carrigan's claim that the statute is unconstitutionally overbroad or vague. See Groener, 651 P.2d at 742-43 (rejecting a legislator's claim that an ethics statute was unconstitutionally vague where the legislator failed to request an advisory opinion from the state ethics commission regarding the propriety of his conduct).

49. In addition, after reviewing subsections 2 and 8 of NRS 281A.420 in light of the statute's intended scope and purpose, the Court finds that the statute is not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments.

50. The United States Supreme Court has recognized that the overbreadth and vagueness doctrines are "strong medicine" which must be used "sparingly and only as a last resort." Broadrick, 413 U.S. at 613. In addition, a statute should not be invalidated on its face "when a limiting construction has been or could be placed on the challenged statute." Id. Likewise, a statute should not be

invalidated on its face if its impact on the First Amendment is so speculative or slight that "[t]he First Amendment will not suffer if the constitutionality of [the statute] is litigated on a case-by-case basis." Clements v. Fashing, 457 U.S. 957, 971-72 n.6 (1982); Broadrick, 413 U.S. at 615-16.

51. Under the overbreadth doctrine, a statute is not overbroad merely because the statute, if construed in abstract or obtuse ways, has some speculative or unrealized potential to prohibit a marginal amount of protected speech. Broadrick, 413 U.S. at 615-17. Rather, for a court to invalidate a statute as overbroad, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615. Therefore, to prevail on an overbreadth challenge, it is not enough for the petitioner to show that there is a possibility of some overbreadth. Instead, the petitioner "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 14 (1988)). If the scope of the statute, as construed consistently with its intended purpose, reaches mostly unprotected speech, the statute will be upheld even though it "may deter protected speech to some unknown extent." Broadrick, 413 U.S. at 615; City of Las Vegas v. Dist. Ct., 122 Nev. ---, 146 P.3d 240, 247 (2006).

52. When applying the overbreadth doctrine, a statute is subject to less exacting scrutiny when it regulates political activity in an even-handed and neutral manner and is not attempting to suppress

any particular viewpoint. Broadrick, 413 U.S. at 615-16. In this case, subsections 2 and 8 of NRS 281A.420 regulate in an even-handed and neutral manner because they prohibit all disqualified public officers from voting on a matter, regardless of viewpoint and regardless of whether the public officer wants to vote "yes" or "no" on the matter. Thus, because the statute "is not a censorial statute, directed at particular groups or viewpoints," it is subject to less exacting scrutiny for overbreadth. Id. at 616.

53. Applying that scrutiny to subsections 2 and 8 of NRS 281A.420, the Court finds that the scope of the statute, when construed consistently with its intended purpose, reaches mostly unprotected speech. The purpose of the statute is to prevent public officers from voting upon matters when private interests create an actual conflict of interest or the appearance of a conflict of interest. It has been a universal and long-established rule under the common law that members of public bodies are prohibited from voting upon matters in which they have disqualifying conflicts of interest, and this traditional common-law rule "is founded on principles of natural justice and sound public policy." Bd. of Superv'rs v. Hall, 2 N.W. 291, 294 (Wis. 1879); Daly v. Ga. S. & Fla. R.R., 7 S.E.146, 149 (Ga. 1888); Sec. Nat'l Bank v. Bagley, 210 N.W. 947, 951 (Iowa 1926); Woodward v. City of Wakefield, 210 N.W. 322, 323 (Mich. 1926); Commw. ex rel. Whitehouse v. Raudenbush, 94 A. 555, 555 (Pa. 1915); Pyatt v. Mayor & Council of Dunellen, 89 A.2d 1, 4-5 (N.J. 1952). When there has been a "universal and long-established" tradition under the common law of prohibiting certain conduct, this creates a "strong presumption" that the prohibition is

constitutional under the First Amendment. Republican Party of Minn. v. White, 536 U.S. 765. 785 (2002). Thus, because public officers do not have a First Amendment right to vote upon matters in which they have disqualifying conflicts of interest, subsections 2 and 8 of NRS 281A.420 prohibit only unprotected speech and are not unconstitutionally overbroad.

54. Furthermore, even assuming that subsections 2 and 8 of NRS 281A.420, if construed in abstract or obtuse ways, have some speculative or unrealized potential to prohibit a marginal amount of protected speech, that potential is not enough to make the statute *substantially* overbroad. As explained by the Nevada Supreme Court, "[e]ven if a law at its margins proscribes protected expression, an overbreadth challenge will fail if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." City of Las Vegas, 146 P.3d at 247 (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

55. In this case, Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. When the Legislature enacted the definition of "commitment in a private capacity to the interests of others" in Senate Bill No. 478 (70th Sess. 1999), it clearly had in mind situations where a public officer's substantial and continuing relationship with his campaign manager would require abstention. In the legislative hearings on S.B.478, Senator Dina Titus and Scott Scherer, Legal Counsel to the Governor, had the following discussion regarding the definition:

Senator Titus questioned:

> I just have a question of how this would fit with either the existing language or the new language. One of the cases that had a lot of notoriety involved a commissioner and someone who had worked on her campaign. Sometimes people who do campaigns then become lobbyists. If you could not vote on any bill that was lobbied by someone who had previously worked on your campaign, how would all of that fit in here. It is not really a business relationship or a personal relationship, but I don't [do not] know what it is.

Mr. Scherer stated:

> The way that would fit in . . . the new language that the Governor is suggesting is that it would not necessarily be included because it would not be a continuing business relationship. So the relationship would have to be substantial and continuing. Now, if this was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999) (emphasis added).

56. In light of this legislative history, it would be detrimental to society to invalidate the statute on its face when Councilman Carrigan's conduct falls squarely within the intended scope of the statute and

was not protected by the First Amendment. The statute also should not be invalidated on its face because the statute's impact on the First Amendment is so speculative or slight that the First Amendment will not suffer if the constitutionality of the statute is litigated on a case-by-case basis by petitioners whose conduct does not fall so squarely within the confines of the statute.

57. Thus, the Court rejects Councilman Carrigan's overbreadth challenge because: (1) subsections 2 and 8 of NRS 281A.420 are intended to prohibit only unprotected speech and, to the extent that the statute reaches protected speech, if any at all, the statute's reach is marginal and therefore is not *substantially* overbroad; and (2) Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. Accordingly, the Court holds that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad in violation of the First Amendment.

58. Under the vagueness doctrine, a statute does not have to be drafted with hypertechnical precision to survive constitutional scrutiny because "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). Thus, it is constitutionally permissible for a statute to be drafted with flexibility and reasonable breadth, rather than meticulous specificity. Id. As explained by the United States Supreme Court:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that

> although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Letter Carriers, 413 U.S. at 578-79.

59. When applying the vagueness doctrine, a statute is subject to less exacting scrutiny for vagueness if it imposes only civil sanctions, instead of criminal penalties, since the United States Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Hoffman Estates, 455 U.S. at 498-99; Groener, 651 P.2d at 742 (holding that ethics statute which imposed only civil sanctions was subject to less exacting scrutiny for vagueness).

60. In this case, the Commission may impose only civil sanctions for a violation of the Ethics Law. NRS 281A.480. The Ethics Law does not contain any criminal penalties for a violation of its provisions. Therefore, because a violation of subsections 2 and 8 of NRS 281A.420 does not result in criminal penalties, the statute is subject to less exacting scrutiny for vagueness.

61. Councilman Carrigan contends that the Court should apply a higher level of scrutiny to the provisions of the Ethics Law because the Commission may take actions under NRS 281A.480 which could result in severe consequences for a public officer, including referring the matter to the Attorney General or the appropriate District Attorney for a

determination of whether a crime has been committed and whether the public officer should be prosecuted under the *criminal laws* of this state. The Court finds that because none of the actions which the Commission is authorized to take under NRS 281A.480 could result in a public officer being criminally prosecuted under the provisions of the *Ethics Law,* it would be inappropriate for the Court to apply a higher level of scrutiny to the Ethics Law.

62. Under NRS 281A.480(4)(a), if the Commission finds that a public officer who is removable from office by impeachment only has committed a willful violation of the Ethics Law, the Commission is required to file a report with the appropriate person responsible for commencing impeachment proceedings. It is well established, however, that impeachment proceedings are not criminal proceedings and that a judgment entered in impeachment proceedings is not a criminal conviction. Nev. Const. art. 7, § 2; see also 1 Joseph Story, Commentaries on the Constitution of the United States §§ 781-86 (5th ed. 1905); Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924) ("The primary purpose of an impeachment is to protect the state, not to punish the offender.").

63. Under NRS 281A.480(4)(b) & (4)(c), if the Commission finds that a public officer who is removable from office pursuant to NRS 283.440 has committed one or more willful violations of the Ethics Law, the Commission is authorized, and in some cases the Commission is required, to commence removal proceedings in the appropriate court pursuant to NRS 283.440 for removal of the public officer. It is well established, however, that removal

proceedings conducted pursuant to NRS 283.440 are civil proceedings and that a judgment of removal entered in those proceedings is not a criminal conviction. Adler v. Sheriff, 92 Nev. 436, 439 (1976) ("The laws for removal of public officers are not criminal statutes nor are the proceedings criminal proceedings.").

64. Under NRS 281A.480(6), a public employee who has committed a willful violation of the Ethics Law is subject to disciplinary proceedings by his employer and must be referred for action in accordance with the applicable provisions governing his employment. It is well established, however, that disciplinary proceedings conducted against public employees are administrative proceedings, not criminal proceedings. Navarro v. State ex rel. Dep't of Human Res., 98 Nev. 562, 563-65 (1982); State ex rel. Dep't of Human Res. v. Fowler, 109 Nev. 782, 784-85 (1993).

65. Finally, NRS 281A.480(7) provides:

> 7. The provisions of this chapter do not abrogate or decrease the effect of the provisions of the Nevada Revised Statutes which define crimes or prescribe punishments with respect to the conduct of public officers or employees. If the Commission finds that a public officer or employee has committed a willful violation of this chapter which it believes may also constitute a criminal offense, the Commission shall refer the matter to the Attorney General or the district attorney, as appropriate, for a determination of whether a

crime has been committed that warrants prosecution.

66. Even though the Commission is required to refer certain matters to the Attorney General or the appropriate District Attorney for a determination of whether criminal prosecution is warranted by a state or local prosecutor, such a criminal prosecution could not occur under the provisions of the Ethics Law because the Ethics Law does not contain any criminal penalties for a violation of its provisions. Rather, such a criminal prosecution could occur only under the criminal laws of this state.

67. Thus, because the Ethics Law does not contain any criminal penalties for a violation of its provisions, the only direct consequence Councilman Carrigan faced for his violation of the Ethics Law was the imposition of civil sanctions by the Commission. NRS 281A.480. And, in this case based on its view of the facts, the Commission did not impose any civil sanctions against Councilman Carrigan at all. (ROA000012-13.) Accordingly, given that the Commission may impose only civil sanctions for a violation of subsections 2 and 8 of NRS 281A.420, the Court finds that the statute is subject to less exacting scrutiny for vagueness.

68. Furthermore, when the government restricts the speech of its public officers and employees, it may use broad and general language even if such language would create "a standard almost certainly too vague when applied to the public at large," Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion). For example, a federal statute allowed the government to remove a federal employee

"for such cause as will promote the efficiency of the service." Arnett v. Kennedy, 416 U.S. 134, 158-62 (1974) (plurality opinion). An employee who was discharged for making public statements critical of his supervisors claimed that the statute was unconstitutionally overbroad and vague. Id. The United States Supreme Court rejected the constitutional challenge, with the plurality opinion stating that "[b]ecause of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal." Id. at 161. The plurality opinion also emphasized "[t]he essential fairness of this broad and general removal standard, and the impracticability of greater specificity," and explained that "it is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'" Id. at 161 (quoting Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968)).

69. In a case challenging the constitutionality of the rule of judicial conduct which requires judges to recuse themselves when their "impartiality might reasonably be questioned," a federal district court held that the rule was not overbroad or vague. Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d 672, 708-10 (E.D. Ky. 2004). The court found that while the rule is stated in broad and general terms, the rule also contains four specific instances which

require recusal: (1) personal bias or prejudice concerning a party or attorney; (2) personal involvement in the controversy; (3) personal or economic interest that could be affected by the controversy; and (4) involvement of a spouse or relative in the controversy. The court held that the rule did not prohibit a substantial amount of protected speech in relation to its many legitimate applications, and that "if the Court were to invalidate the recusal laws based on overbreadth, then the state's ability to safeguard the impartiality or appearance of impartiality of the judiciary would be greatly compromised." Id. at 709-10. The court also held that the rule was not vague because it provided enough guidance for a judge to determine, "in most instances," the circumstances when his "impartiality might reasonably be questioned" so as to require recusal. Id. at 710; see also Kan. Jud. Watch v. Stout, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005).

70. In a similar vein, the Nevada Supreme Court has held that broad and general terms, like "unprofessional conduct," are not vague when used to define the ethical standards governing various professions. Laman v. Nev. Real Estate Advisory Comm'n, 95 Nev. 50, 55-56 (1979); Meinhold v. Clark County Sch. Dist., 89 Nev. 56, 63 (1973), *cert. denied*, 414 U.S. 943 (1973); Moore v. Bd. of Trustees, 88 Nev. 207, 210-11 (1972), *cert. denied*, 409 U.S. 879 (1972). As explained by the court:

> [T]he variety of forms which unprofessional conduct may take makes it infeasible to attempt to specify in a statute or regulation all

> of the acts which come within the meaning of the term. The fact that it is impossible to catalogue all of the types of professional misconduct is the very reason for setting up the statutory standard in broad terms and delegating to the board the function of evaluating the conduct in each case.

Moore, 88 Nev. at 211 (quoting In re Mintz, 378 P.2d 945, 948 (Or. 1963)).

71. In this case, the reasonable catch-all standard of "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection" is designed to capture the infinite variety of factual situations in which private commitments and relationships will cause a public officer to have a disqualifying conflict of interest. Considering that it would have been infeasible for the Legislature to employ exhaustive detail to catalogue every type of disqualifying conflict of interest in the language of the statute, it was appropriate for the Legislature to enact such a reasonable catch-all standard and allow the Commission to apply that standard to specific conduct in each case.

72. Furthermore, because the language of the catch-all provision is expressly tied to the four types of private commitments and relationships already enumerated in the statute, the Legislature has given the Commission and public officers four very specific and concrete examples to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission.

73. Finally, the legislative hearings on S.B. 478 also provide guidance to the Commission and public officers regarding the meaning of the catch-all provision. On March 30, 1999, Scott Scherer, Legal Counsel to the Governor, explained the intent, purpose and scope of the catch-all provision:

> [The new language in NRS 281A.420] would be, 'any substantially similar commitment or relationship.' Because I can tell you what the Governor was trying to get at was actually trying to make the language better by defining 'commitment in a private capacity to the interests of other.' That, I think, is even more vague than the language we have in here, which sets forth some categories. We also, though, on the other hand, did not want to specifically limit it to just these categories. But what we were trying to get at relationships that are so close that they are like family. That they are substantially similar to a business partner. And so, I think if we took out the words 'or personal' in lines 16 and 17, and then we said, 'any substantially similar commitment or relationship.' That would express the view that we are trying to get at which is, it has got to be a relationship that is so close, it is like family, it is like a member of your household, it is like a business partner.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42-43 (Nev. Mar. 30, 1999).

74. On April 7, 1999, Mr. Scherer provided additional commentary regarding the intent, purpose and scope of the catch-all provision:

Referencing an amendment in Exhibit I, Mr. Scherer drew attention to the issue of personal relationships . . . He suggested the amendment . . . rewrite paragraph (e) to read, "any commitment or relationships that is substantially similar to any one of the relationships set forth in this paragraph." The intent of change, he stated, is to capture a relationship, not listed in paragraphs (a), (b), (c), or (d), but is so close to the extent the individual considers them family. He commented with this change the ethics commission would still have some discretion to require a disclosure and an abstention in those kinds of cases. But, he pointed out, it has to actually be shown that the relationship is substantially similar to one of the four other relationships listed, including a member of one's family, member of one's household, an employment relationship, or a business relationship. The commission, he restated, would have to show the relationship is "as close as" or "substantially similar" . . . He reiterated this would give the ethics commission some discretion for those egregious cases that may slip through the cracks otherwise, while still giving some guidance to public officials who need to know what their obligations are. He declared this language to be an improvement on existing law and an appropriate balance between trying to provide guidance and trying to allow the ethics commission discretion.

Chairman O'Connell concurred stating, "I do not think that that language could leave any

> doubt in anybody's mind about the relationship. In my looking at it, I think you did a terrific job with that, because it certainly does tell you exactly what kind of relationship you would have with the person and it would make it much easier to determine that before voting."
>
> Mr. Scherer agreed the proposal was superior to the currently undefined, "commitment in a private capacity to the interests of others." He stressed the importance of attempting to give guidance without completely taking away the ethics commission's discretion.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 32-33 (Nev. Apr. 7, 1999).

75. In the face of this legislative history, it is reasonable to expect a public officer of ordinary intelligence to understand the types of private commitments and relationships that are "substantially similar" to those he has with: (1) a member of his household; (2) a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (3) a person who employs him or a member of his household; or (4) a person with whom he has a substantial and continuing business relationship. Through the exercise of ordinary common sense, a reasonable public officer could readily deduce that the four types of private commitments and relationships that are explicitly described in the statute all involve close, substantial and continuing relationships. It follows by simple logic that the catch-all provision extends to "substantially similar" private commitments and

relationships which also constitute close, substantial and continuing relationships akin to those commitments and relationships that are explicitly described in the statute. Because it is not unreasonable to expect a public officer to know when he has a close, substantial and continuing relationship with another person, most public officers should have little difficulty in conforming their conduct to the dictates of the statute. To the extent that public officers and their attorneys are in need of further guidance, they can request advisory opinions from the Commission pursuant to NRS 281A.440(1) and 281A.460.

76. Thus, the Court rejects Councilman Carrigan's vagueness challenge because: (1) Councilman Carrigan failed to seek an advisory opinion and thereby obtain clarification of the statute from the Commission when he had ample opportunity to do so; (2) the statute contains sufficiently clear standards so that a reasonable public officer exercising ordinary common sense can adequately understand the type of conduct that is prohibited by the statute; and (3) the statute contains four very specific and concrete examples of prohibited conduct to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission.

The Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in this case.

77. Councilman Carrigan claims that the presumption contained in subsection 2 of NRS

281A.420 was ignored and was not rebutted by any evidence or testimony received by the Commission. The Court disagrees.

78. The presumption contained in subsection 2 of NRS 281A.420 states:

> It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.

79. As illustrated by the following discussion on the record at the hearing, the Commission fully considered the presumption and concluded that it simply did not apply to Councilman Carrigan based on the facts:

> COMMISSIONER HSU: I think people put too much emphasis on this language when I see people argue it when the resulting benefit or detriment accruing to him would not be greater than any accruing to any other member in a general business. There is only one lobbyist hired by Harvey Whittemore's group to do this, at least in terms of what I heard. It's not like the entire business profession of lobbyists are being affected uniformly. That's kind of what that language is there for.

So I just don't see how that applies. I mean, we have one person, Carlos Vasquez is who is the spokesman or paid consultant for the Lazy 8 people, and he certainly gets the professional benefit by having this approved, and of course, the vote was that it got denied, the vote, but I just don't see how that language applies because it is not a broad application.

Again, . . . I just don't see how every—how the entire group of lobbyists is being affected by the passage or failure of this vote. Thanks.

* * *

COMMISSIONER JENKINS: . . . We might consider that Councilman Carrigan is a resident of his ward and the decision to participate in the vote and his bringing the motion and voting for it would not bring him or the project—well, him any greater benefit than any other resident of his ward. But you know, Vasquez just really throws a wrench in the whole thing, doesn't he?

VICE CHAIRMAN HUTCHISON: If I can comment, Commissioner Jenkins . . . [W]e're not talking about [Councilman Carrigan's] pecuniary interest, we're talking about his commitment in a private capacity to the interests of others. So we're not talking about his interest as a citizen, we're talking about the private capacity interest to Mr. Vasquez.

So I think that Commissioner Hsu's reasoning does, I think, apply . . . Mr. Vasquez was in a different position than the general business, profession, occupation or group in

terms of the Lazy 8 and the passage of the matter that was before the Council on August 23rd.

So I do think that Commissioner Hsu's reasoning makes sense to me and that paragraph does not necessarily save the day.

COMMISSIONER JENKINS: . . . I can't find any support for that paragraph, you're right, about the benefit being more or less than anyone else in a group.

(ROA000066-67.)

80. Therefore, the Court holds that the Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in Councilman Carrigan's case.

The Commission's decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion.

81. After review of the record, the Court finds that substantial evidence exists to support the Commission's conclusion that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted on the Lazy 8 project.

82. "Substantial evidence" is defined as evidence which a reasonable mind might accept as adequate to support a conclusion. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005).

83. The intent of the Ethics Law is clear. When creating the Ethics Law, the Legislature declared:

> To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

NRS281A.020(2)(b).

84. Accordingly, the disclosure and abstention law holds public officers accountable to the public for complete disclosures of private commitments and for the proper exercise of their judgment to abstain or not to abstain, by requiring them to make that judgment after evaluating their private commitments and the effects of their decision on those private commitments. NRS 281A.420; see also In re Woodbury, Nev. Comm'n on Ethics Op. No. 99-56, at 2 (Dec. 22, 1999).

85. Subsection 2 of NRS 281A.420 states in part:

> [A] public officer shall not vote upon or advocate the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others.

86. "Commitment in a private capacity to the interests of others" is defined in subsection 8 of NRS 281A.420 as:

> [A] commitment to a person:

(a) Who is a member of his household;

(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs him or a member of his household;

(d) With whom he has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

87. The relationship and commitment shared by Councilman Carrigan and Vasquez is the type that the Legislature intended to encompass when adopting the definition of "commitment in a private capacity to the interest of others," specifically, paragraph (e) of subsection 8 of NRS 281A.420. This is evidenced by the testimony given by Schott Scherer, General Counsel to Governor Guinn during the 1999 legislative session.

[I]t has to actually be shown that the relationship is substantially similar to one of the four other relationships listed, including a member of one's family, member of one's household, an employment relationship, or a business relationship. The commission, he restated, would have to show the relationship is "as close as" or "substantially similar" to one listed in section 15, subsection 7 of the bill. He reiterated this would give the ethics commission some discretion for those egregious cases that may slip through the cracks

> otherwise, while still giving some guidance to public officials who need to know what their obligations are.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 33 (Nev. Apr. 7, 1999).

88. In response to Senator Titus' question as to how campaign managers fit into the statute, Mr. Scherer responded:

> The way that would fit in . . . if this was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999).

89. The Court agrees with the Commission that the sum total of the relationship shared by Councilman Carrigan and Vasquez equates to a relationship such as those enumerated under NRS 281A.420(8)(a)-(d), including a close, personal friendship akin to family and a "substantial and continuing business relationship."

90. First, in addition to being a close personal friend, Councilman Carrigan would confide in Vasquez on matters where he would not his own family such as siblings. (ROA000035.)

91. Second, as Councilman Carrigan's volunteer campaign manager, Vasquez was instrumental in getting him elected three times to the Council. (ROA000022, 47.)

92. Third, companies owned by Vasquez were paid by Councilman Carrigan's campaign for providing printing, advertising and public relations services. These services were provided at cost, and Vasquez and his companies did not make any profit from these services. (ROA000051.)

93. Finally, as campaign manager, Vasquez actively solicited campaign contributions for the benefit of Councilman Carrigan. As part of that solicitation, Vasquez relied on his many community and business contacts and he sent fund-raising letters to approximately 700 potential donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were otherwise directly interested in the success of the Lazy 8 project. (ROA000044.)

94. The Commission found that "[a] reasonable person in Councilman Carrigan's position . . . would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment." (ROA00012).

95. In Woodbury, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he sits. Nev. Comm'n on Ethics Op. No. 99-56, at 2. Before abstention is required, a reasonable person's independence of judgment "must be ***materially*** affected" by that private commitment. Id.

96. In the instant case, prior to voting on the Lazy 8 project, Councilman Carrigan sought advice from the Sparks City Attorney, his legal counsel.

(ROA000112-114.) Neither Councilman Carrigan nor his legal counsel consulted the Commission or the Woodbury opinion for guidance prior to the vote on the Lazy 8 project. In advising Councilman Carrigan, legal counsel relied on a 1998 Attorney General Opinion (AGO 98-27). (ROA000112.)

97. AGO 98-27 advises that in "difficult or complex matters, the next step is to consider seeking an advisory opinion from the Ethics Commission." (ROA000115.) This opinion also states that abstention is required:

> where it appears from objective evidence that as a result of the acquaintance or friendship, a reasonable person in the public officer's situation would have no choice but to be beholden to someone who has an actual interest in the matter . . . In such circumstances, the public official's independence of judgment would be materially affected.

(ROA000121.)

98. The Court finds that substantial evidence exists to support the Commission's conclusion that at the time of the vote on the Lazy 8 project, Councilman Carrigan had a private commitment to the interest of Vasquez, such that the independence of judgment of a reasonable person in Councilman Carrigan's situation would have been materially affected by that commitment. Therefore, Councilman Carrigan had a disqualifying conflict of interest and was required to abstain pursuant to subsection 2 of NRS 281A.420.

99. Because Councilman Carrigan was required to abstain under the statute, his vote on the Lazy 8 project was a violation of subsection 2 of NRS 281A.420.

100. Therefore, the Court holds that the Commission's final decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion.

Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

101. Commissioners who serve on the Nevada Commission on Ethics are public officers subject to the Ethics Law. As such, a Commissioner must disclose conflicts of interests and abstain on matters where a reasonable person's independence of judgment would be materially affected by a commitment in a private capacity or his pecuniary interests, pursuant to NRS 281A.420.

102. Additionally, the Commission is a quasi-judicial body. As such, it looks to the Nevada Code of Judicial Conduct for guidance on matters concerning conflicts of interest and disqualification. NAC 281.214(3). Canon 3E of the Nevada Code of Judicial Conduct states in part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

* * *

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

* * *

103. Based on these standards, and the fact that Councilman Carrigan waived any objections to the participation of Commissioners Hsu and Flangas, Councilman Carrigan's constitutional rights to due process were not violated.

Commissioner Hsu

104. Councilman Carrigan argues that Commissioner Hsu was biased due to the apparent representation of The Nugget[3] by his law firm, Maupin Cox & LeGoy. However, there is no evidence that Commissioner Hsu himself ever represented The Nugget or that he knew of his firm's representation of The Nugget at the time of Councilman Carrigan's

---

[3]The Nugget is an opponent of the Lazy 8 project.

hearing. Additionally, The Nugget was not a party to the matter heard by the Commission.

105. Further, although Commissioner Hsu did vote in favor of a finding in violation of subsection 2 of NRS 281A.420, which was unanimous, he also argued against finding a violation of subsection 4 of NRS 281A.420 and a divided majority agreed. (ROA000061, 68.)

106. Finally, Commissioner Hsu made a detailed disclosure based on his personal involvement in a previous lawsuit brought on behalf of Vasquez's father against Vasquez, and his personal knowledge of his law partner's subsequent representation of Vasquez's business interests. (ROA000017.) After these disclosures, Commissioner Hsu made it clear that he would defer to any motion made by Councilman Carrigan to disqualify him if Councilman Carrigan had any objection. Councilman Carrigan's counsel expressly waived any objections. (ROA000017.)

Commissioner Flangas

107. Councilman Carrigan argues that Commissioner Flangas' familial relationship to Alex Flangas, a purported attorney for The Nugget, and Alex's wife Amanda Flangas, who works for The Nugget, required his disqualification.

108. NRS 281A.420 requires a public officer's disclosure on a matter which would reasonably be affected by his commitment to a person who is related to him by blood, adoption or marriage "within the third degree of consanguinity or affinity." Further, a public officer must abstain where a reasonable

person's independence of judgment would be materially affected by such a relationship.

109. During the hearing, Commissioner Flangas disclosed his familial relationship to Alex Flangas. Specifically, Commissioner Flangas disclosed that he was raised by his first cousin once removed (his father's first cousin), who is the grandfather to Alex Flangas. (ROA000055.) Thus, Alex Flangas and his wife Amanda Flangas are not within the third degree of consanguinity or affinity to Commissioner Flangas. Consequently, no disclosure or abstention by Commissioner Flangas was required based on his familial relationship to Alex and Amanda Flangas because that relationship is not within the third degree of consanguinity or affinity.

110. Furthermore, after Commissioner Flangas' disclosure, Councilman Carrigan's counsel waived any objection to Commissioner Flangas' continued participation in the hearing. (ROA000055.)

111. Therefore, the Court finds that Councilman Carrigan has not established a due process violation based on the participation of either Commissioner Hsu or Commissioner Flangas, especially in light of Councilman Carrigan's express waiver of any objections. Accordingly, the Court holds that Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

ORDER AND JUDGMENT

112. Based on the foregoing, the Court holds that: (1) subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in

violation of the First Amendment; (2) subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments; (3) the Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in this case; (4) the Commission's decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion; and (5) Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

113. Therefore, the Court denies the Petition for Judicial Review and affirms the final decision of the Commission pursuant to NRS 233B.135(3).

114. All parties shall bear their own costs and attorney's fees.

115. Pursuant to N.R.C.P. 58, the Court hereby designates the Respondent as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order and judgment, upon each party who has appeared in this case and upon Amicus Curiae; and (2) file such notice of entry with the Clerk of Court.

DATED: This 28th day of May, 2008.

/s/

WILLIAM A. MADDOX
DISTRICT COURT JUDGE

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Appendix C

Nevada Commission on Ethics Opinion

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING THE CONDUCT OF MICHAEL CARRIGAN, Councilman, City of Sparks

Opinion Nos. 06-61, 06-62, 06-66 and 06-68

_____/

This matter came before a quorum[1] of the Nevada Commission on Ethics (hereinafter the "Commission") for a hearing on August 29, 2007, pursuant to Requests for Opinion filed with the Commission and a determination made on May 23, 2007, by a Commission panel finding just and sufficient cause for the Commission to hold a hearing on the matter and render an opinion on whether Councilman Carrigan's conduct violated the provisions of NRS 281.481(2), NRS 281.501(2), and/or NRS 281.501(4).

The issues before the Commission in this matter are limited to the following:

1. Did Councilman Carrigan use his official position in government to secure or grant

[1]The quorum consisted of Vice Chairman Hutchison and Commissioners Capurro, Cashman, Flangas, Hsu and Jenkins. Commissioner Keele and Chairman Kosinski served as the panel in this matter. Pursuant to NRS 281.462(4), panel members are prohibited from participating in any further proceedings of the Commission relating to the matter.

unwarranted[2] privileges, preferences, exemptions or advantages for himself or any person to whom he has a commitment in a private capacity to the interests of that person in violation of NRS 281.481 (2) by acting on the Red Hawk Land Company's ("Red Hawk") proposed Lazy 8 development project ("Lazy 8") at the August 23, 2006 Sparks City Council ("Council") meeting?

2. At the August 23, 2006 Council meeting, when the Council was considering approval of the Lazy 8, did Councilman Carrigan fail to sufficiently disclose his relationship with Carlos Vasquez, a consultant and spokesperson for Red Hawk, in violation of NRS 281.501(4)?

3. At the August 23, 2006 Council meeting, did Councilman Carrigan fail to abstain from voting on the Lazy 8 matter in violation of NRS 281.501(2)?

Notice of the hearing was properly posted and served. Councilman Carrigan was present with his counsel, David Creekman, Esq., Senior Assistant City Attorney and Doug Thornley, Esq., Assistant City Attorney and provided sworn testimony. Carlos Vasquez appeared as a witness and provided sworn testimony.

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[2]As used in NRS 281.481(2), "unwarranted" means without justification or adequate reason.

FINDINGS OF FACT

The Commission, after hearing testimony and considering the evidence presented, makes the following Findings of Fact:

1. Michael Carrigan is a Sparks City Council member representing Ward 4.

2. Carlos Vasquez is a consultant for Red Hawk.

3. Carlos Vasquez owns various companies that provide publics relations services for candidates running for public office and he also manages campaigns for candidates for public office.

4. Councilman Carrigan and Carlos Vasquez have been friends since 1991.

5. The friendship between Councilman Carrigan and Carlos Vasquez is close, substantial and continuing.

6. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 1999.

7. Councilman Carrigan was elected to the Sparks City Council in 1999.

8. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 2003.

9. Councilman Carrigan was reelected to the Sparks City Council in 2003.

10. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 2006.

11. Councilman Carrigan was reelected to the Sparks City Council in 2006.

12. Carlos Vasquez and his companies provided public relations and advertising services to Councilman Carrigan during all three of his political campaigns.

13. Councilman Carrigan moved the Council to tentatively approve the amendment to Red Hawk's planned development handbook and voted "yes" on the Lazy 8 agenda item at the August 23, 2006 Council meeting; his motion failed.

14. Prior to voting "yes," Councilman Carrigan disclosed to the Council and the public that Carlos Vasquez was his personal friend and campaign manager.

15. A majority of Councilman Carrigan's constituency favored the Lazy 8.

16. The second motion by the Council on the Lazy 8 matter on August 23, 2006 passed by a 3 to 2 vote. The motion called for denial of approval of the amendment to Red Hawk's planned development handbook. Councilman Carrigan was one of the two negative votes.

17. Prior to his August 23, 2006 vote, Councilman Carrigan requested a legal opinion from the Sparks City Attorney regarding whether a conflict existed prohibiting him from acting on the Lazy 8 matter.

18. The Sparks City Attorney advised Councilman Carrigan that unless he stood to reap either financial or personal gain or loss as a result of his official action and because the City Attorney was unaware of any facts establishing the existence of such a gain or loss, nothing prohibited Councilman

Carrigan from acting on the Lazy 8 matter at the August 23, 2006 council meeting.

19. Councilman Carrigan relied on his legal counsel's advice and he testified before the Commission that if counsel had told him to abstain on the Lazy 8 matter, he would have done so.

20. Prior to casting his votes on the Lazy 8 matter on August 23, 2006, Councilman Carrigan was aware that he could have asked the Commission for an advisory opinion, but instead he relied on his counsel's advice.

21. Should any finding of fact be better construed as a conclusion of law, it may be so deemed.

CONCLUSIONS OF LAW

1. At all relevant times, Councilman Carrigan was an elected Sparks City Councilman, and as such was a public officer as defined in NRS 281.4365.

2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.465 and NRS 281.511, subsection 2, paragraph (b).

3. Councilman Carrigan has a commitment in a private capacity to the interest of Carlos Vasquez within the definition of NRS 281.501, subsection 8.

4. Councilman Carrigan did not violate NRS 281.481, subsection 2, and did not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for Carlos Vasquez.

5. Councilman Carrigan did not violate NRS 281.501, subsection 4, and he sufficiently disclosed

his relationship with Carlos Vasquez to the Council and to the public.

6. Councilman Carrigan violated NRS 281.501, subsection 2, by not abstaining from voting on the Lazy 8 matter at the August 23, 2006 Council meeting.

7. Councilman Carrigan's violation of NRS 281.501, subsection 2, was not willful under the definition of "willful" in NRS 281.4375.

8. Should any conclusion of law be better construed as a finding of fact, it may be so deemed.

WHEREFORE, based upon a preponderance of the evidence in this matter in support of the foregoing findings of fact and conclusions of law, the Commission renders the following Opinion:

OPINION

The Nevada Legislature has declared it to be the public policy of this state that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves." Further, the Nevada Legislature has declared that, "to enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens." NRS 281.421. Therefore, charged with interpreting and enforcing the Ethics in Government Law, the Commission must hold public officers accountable when they fail to place the public

interest and public trust ahead of their private interests.

In determining whether Councilman Carrigan violated any of the provisions of the Ethics in Government Law at issue, the Commission must ascertain whether Councilman Carrigan had a "commitment in a private capacity to the interest of" Mr. Vasquez.

NRS 281.501(8) provides:

> As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:
>
> (a) Who is a member of his household;
>
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
>
> (c) Who employs him or a member of his household;
>
> (d) With whom he has a substantial and continuing business relationship; or
>
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

In 1999, the Nevada State Legislature excluded mere friendships from its definition of "commitment in a private capacity to the interests of others." However, the definition contemplated close relationships which rise to such a level of commitment to another person's interests that the independence of judgment of a reasonable person in

the public officer's position would be affected. Independence of judgment means a judgment that is unaffected by that commitment or relationship. It is important to note that the test under the statute is not the independence of judgment of the public officer making the assessment whether his independence of judgment is affected. Rather, the test calls for the independence of judgment of a "reasonable person."

The legislature enumerated the commitments and relationships where the independence of judgment of a reasonable person in a given situation is sure to be affected. *See* NRS 281.501(8)(a)-(d). Additionally, the legislature contemplated commitments and relationships that, while they may not fall squarely within those enumerated in NRS 281.501 (8)(a)-(d), are substantially similar to those enumerated categories because the independence of judgment may be equally affected by the commitment or relationship. The legislature enacted NRS 281.501(8)(e) to include such cases. The commitment and relationship shared by Councilman Carrigan and Mr. Vasquez are illustrative of those contemplated by NRS 281.501(8)(e).

In a 1999 meeting of the Senate Committee on Government Affairs, Senator Dina Titus questioned Scott Scherer, Legal Counsel to Governor Guinn, regarding NRS 281.501(8)(e), as follows:

> "I just have a question of how this would fit with either the existing language or the new language. One of the cases that had lot of notoriety involved a commissioner and someone who had worked on her campaign. Sometimes people who do campaigns then

become lobbyists. If you could not vote on any bill that was lobbied by someone who had previously worked on your campaign, how would all of that fit in here. It is not really a business relationship or a personal relationship, but I don't [do not] know what it is."

Mr. Scherer responded:

". . . The way that would fit in . . . the new language that the Governor is suggesting is that it would not necessarily be included because it would not be a continuing business relationship. So the relationship would have to be substantial and continuing. *Now, if this was one where the same person ran your campaign time, after time, after time and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person.* [Emphasis added.]"

> Legislative Minutes re: Hearing on SB 478 before the Senate Committee on Government Affairs, 70th Leg., at 42 (Nev., March 30, 1999).

Councilman Carrigan admits that Mr. Vasquez, who is his campaign manager and political advisor, was instrumental in the success of all three of Councilman Carrigan's elections. Mr. Vasquez was Councilman Carrigan's campaign manager at the time of the August 23, 2006 Council meeting when the Lazy 8 matter was heard.

Councilman Carrigan argues that his relationship with Mr. Vasquez is not a business relationship. Under Councilman Carrigan's view, a "business relationship" is where money changes hands or a situation where money is made. The Commission rejects such a narrow interpretation of "business relationship."

Councilman Carrigan and Mr. Vasquez both testified that Mr. Vasquez worked in a volunteer capacity on all three of Councilman Carrigan's campaigns for Sparks City Council and that Mr. Vasquez never profited from any of Councilman Carrigan's campaigns. Mr. Vasquez testified that everything he and his companies did for Councilman Carrigan was at cost and that any related funds were a "pass-through," that is, Mr. Vasquez' companies would do work on the campaigns, or farm out the work, and then be reimbursed for costs from Councilman Carrigan's campaign fund. Notwithstanding this at-cost or pass-through arrangement, Mr. Vasquez and his companies provided public relations and advertising services to Councilman Carrigan during all three political campaigns. Councilman Carrigan believes that Mr. Vasquez was instrumental in getting Councilman Carrigan elected in all three of his elections.

Mr. Vasquez has been a close personal friend, confidant and political advisor to Councilman Carrigan throughout the years. Councilman Carrigan confides in Mr. Vasquez on matters where he would not confide in his own sibling. Therefore, The sum total of their commitment and relationship equates to a "substantially similar" relationship to those enumerated under NRS 281.501(8)(a)-(d), including a

close personal friendship, akin to a relationship to a family member, and a "substantial and continuing business relationship." The independence of judgment of a reasonable person in Councilman Carrigan's position would be affected by the commitment and relationship Councilman Carrigan shares with Mr. Vasquez.

Therefore, during the August 23, 2006 Council meeting when the Lazy 8 matter was heard, Councilman Carrigan had a "commitment in a private capacity to the interest of" Mr. Vasquez.

1. **NRS 281.481(2).**

NRS 281.481(2) provides:

> A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:
>
> > (a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.
> >
> > (b) "Unwarranted" means without justification or adequate reason.

The Commission finds that a preponderance of the evidence does not exist to conclude that Councilman Carrigan used his position as Sparks City

Councilman to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself or Mr. Vasquez, a person to whose interests he has a commitment in a private capacity. Councilman Carrigan testified that a majority of constituents in his Ward favored the project. No evidence or testimony was presented in this matter to conclude otherwise. Therefore the Commission finds that Councilman Carrigan did not violate NRS 281.481(2).[3]

2. NRS 281.501(4).

NRS 281.501(4) provides:

> A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:
>
> (a) Regarding which he has accepted a gift or loan;
>
> (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
>
> (c) In which he has a pecuniary interest, without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest.

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[3]Commissioners Capurro, Cashman, Hsu, Hutchison and Jenkins voted to approve the motion, while Commissioner Flangas voted nay.

Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

In the *Woodbury* opinion, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he serves: first, disclosure is required whenever a public officer's actions would "***reasonably*** be affected by his private commitment"; and second, before abstention is also required, a reasonable person's independence of judgment "must be ***materially*** affected" by that private commitment. *In re Woodbury*, CEO 99-56.

The facts presented at the hearing established that prior to the August 23, 2006 Council meeting, Councilman Carrigan requested a legal opinion from the Sparks City Attorney as to whether or not he had a conflict that prohibited him from acting on the Lazy 8 matter. The Sparks City Attorney advised Councilman Carrigan through a legal memorandum that stated in part: "The only type of bias which may lead to disqualification of a public official must be grounded in facts demonstrating that the public

official stands to reap either financial or personal gain or loss as a result of official action...if you anticipate that certain positions you may have previously taken or personal relationships in which you are involved may give rise to allegations of bias against you, you should simply err on the side of caution and disclose sufficient information concerning the positions or relationships before you consider and vote on the issue." The Sparks City Attorney also prepared a disclosure for Councilman Carrigan to make before voting. Relying on this advice, Councilman Carrigan disclosed the following: ". . . I have to disclose for the record something . . . I'd like to disclose that Carlos Vasquez, a consultant for Red Hawk...Land Company is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight. Therefore, according to NRS 281.501, I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue . . ."[4]

3. NRS 281.501(2).

NRS 281.501(2) provides:

> Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but

---

[4]Commissioners Capurro, Cashman, Hsu and Jenkins voted for the motion, while Commissioners Flangas and Hutchison voted Nay.

may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

In Woodbury the Commission opined:

. . . [T]he public (and an elected official's constituents) have an interest in matters which come before such officers and employees. Abstention deprives the public and that official's constituents of a voice in governmental affairs. And, public officers and

> employees should have the opportunity to perform the duties for which they were elected or appointed, *except where private commitments would materially affect one's independence of judgment.* Compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment. And, in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or their appointing authority. The burden, therefore, is appropriately on the public officer or employee to disclose private commitments and the effect those private commitments can have on the decision-making process, and to make a proper determination regarding abstention where a *reasonable person's* independence of judgment would be *materially* affected by those private commitments. *In re Woodbury*, CEO 99-56. [Emphasis added.]

Under the *Woodbury* analysis, the burden was appropriately on Councilman Carrigan to make a determination regarding abstention. Abstention is required where a reasonable person's independence of judgment would be materially affected by his private commitment.

A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant and campaign manager, who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such

circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

Therefore, the Commission unanimously finds that Councilman Carrigan violated NRS 281.501(2) by not abstaining from voting on the Lazy 8 matter on August 23, 2006. However, because the Commission also finds that Councilman Carrigan's violation was not willful, as he reasonably relied on his counsel's advice, and because he did not consider his relationship with Mr. Vasquez a relationship that falls under the statute, it imposes no civil penalty.

CONCLUSION

Based on the foregoing, the Commission finds that Councilman Carrigan's actions did not violate NRS 281.481(2) or NRS 281.501(4). The Commission finds one violation by Councilman Carrigan of NRS 281.501(2). However, because the Commission finds that Councilman Carrigan's violation is not willful, it imposes no civil penalty.

NOTE: THE FOREGOING OPINION APPLIES ONLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES DESCRIBED HEREIN. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE IN THIS OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION.

DATED: October 8, 2007.

NEVADA COMMISSION ON ETHICS

By: /s/
MARK HUTCHISON, Vice Chairman

OPPOSITION BRIEF

No. 10-568

In the Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether state-imposed restrictions on the ability of local elected officials to vote on legislative matters are subject to strict scrutiny review under the First Amendment.

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OPINIONS BELOW

The opinion of the Nevada Supreme Court (Pet. App. 1a-39a) is reported at 236 P.3d 616. The opinion of the First Judicial District Court of Nevada (Pet. App. 40a-95a) is not reported. The administrative opinion of the Nevada Commission on Ethics (Pet. App. 96a-112a) is not reported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on July 29, 2010. The petition for writ of certiorari was filed on October 27, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case arises from a decision of the Nevada Commission on Ethics ("Commission" or "Commission on Ethics") censuring an elected city councilman for voting on a legislative measure when, in the Commission's view, he had a disqualifying "commitment in a private capacity to the interests of others" under Nevada's Ethics in Government Law.[1] Pet. App. 1a-2a. The First Judicial District Court of Nevada affirmed the administrative decision. Pet. App. 40a-95a. The Nevada Supreme Court reversed, invalidating the "catch-all" provision included in the statutory definition of "commitment in a private

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[1] Nev.Rev.Stat. § 281A.010 (2003) provides that Nev.Rev.Stat. Chapter 281A "may be cited as the Nevada Ethics in Government Law."

capacity" as unconstitutionally overbroad. Pet. App. 17a.

1. The First Amendment to the United States Constitution provides, in pertinent part, "Congress shall make no law... abridging the freedom of speech." U.S. Const. amend. I. The First Amendment is applicable to state governments through the Due Process Clause of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

"The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135-136 (1966). Elected representatives have an "obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; *also so they may be represented in governmental debates by the person they have elected to represent them.*" *Id.* at 136-137 (emphasis added).

The Nevada statute at issue in the underlying controversy is Section 281A.420 of the 2007 Nevada Revised Statutes ("Nev.Rev.Stat."). Nev.Rev.Stat. § 281A.420(2)(c) (2007) requires that:

> a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by... [his]

> commitment in a private capacity to the interest of others.[2]

Nev.Rev.Stat. § 281A.420(8) (2007) defines the term "commitment in a private capacity to the interests of others" as a commitment to a person:

> (a) Who is a member of his household;
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
> (c) Who employs him or a member of his household;
> (d) With whom he has a substantial and continuing business relationship; or
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

Restrictions on speech are unconstitutional if they vest a public official with the unbridled discretion to determine which speech is acceptable and which speech is not. Regulations that permit "arbitrary application" are "inherently inconsistent with a valid time, place and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). To

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[2] Nevada's public officials are also precluded from voting or advocating on issues where the independence of judgment of a reasonable person would be materially affected by the acceptance of a gift or loan or other personal pecuniary interests. *See* Nev.Rev.Stat. § 281A.420(2)(a)-(b) (2007).

curtail that risk, a law restricting the exercise of First Amendment freedoms must contain "narrow, objective and definite standards." *Id.* at 131. At the root of this long-standing principle is the "time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency... may result in censorship." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone..." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

2. Michael A. Carrigan is an elected member of the City Council of Sparks, Nevada. Pet. App. 98a. In that capacity, Carrigan represents the citizens who reside in the City's Fourth Ward. *Id.* On August 23, 2006, the City Council voted three to two to deny a land use application proposing the transfer of a tourist commercial zoning designation and a non-restricted gaming entitlement from one development project in Sparks to another project colloquially known as the "Lazy 8." *Id.* at 3a; 43a; 99a. At this meeting, the applicant was represented by a number of people, including Carlos Vasquez. *Id.* at 3a; 46a; 98a.

Vasquez has been a friend of Carrigan since 1991, and volunteered as a campaign manager for Carrigan during his initial election to the Sparks City Council in 1999, and during his subsequent campaigns for re-election in 2003 and 2006. *Id.* at 3a; 98a.

Carrigan disclosed this relationship during the August 23, 2006 public hearing, and unequivocally stated that he was not in a position to reap any type of

benefit from the project, and that he could faithfully and impartially discharge his duties as an elected official in this case. *Id.* at 4a; 46a-47a; 99a. Carrigan voted to approve the Lazy 8 application because a majority of his constituents favored the project. *Id.* at 99a.

In September 2006, several nearly identical ethics complaints were filed against Carrigan with the Nevada Commission on Ethics. *Id.* at 4a; 48a.The complaints alleged that Carrigan used his position as a Sparks City Councilman to secure unwarranted benefits for himself from Vasquez and that Vasquez had an "undue influence" over Carrigan. *Id.* The Commission ultimately charged Carrigan with (1) using his position in government to secure an unwarranted benefit for Vasquez; (2) failing to make an adequate disclosure of his relationship with Vasquez; and (3) failing to abstain from voting on the Lazy 8 application on August 23, 2006. *Id.* at 96a-97a.

3. On August 29, 2007, the Commission on Ethics employed the "catch-all" provision included in the statutory definition of "commitment in a private capacity to the interests of others," Nev.Rev.Stat. § 281A.420(8)(e) (2007), to conclude that the relationship shared by Carrigan and Vasquez was "substantially similar" to a familial relationship within the third degree of consanguinity and a "substantial and continuing business relationship." Pet. App. at 5a; 50a; 105a-106a. On that basis, the Commission determined that Carrigan's relationship with Vasquez obligated Carrigan to abstain from voting in favor of the Lazy 8 application at the August 23, 2006 meeting of the Sparks City Council despite the fact that a

majority of Carrigan's constituency favored the Lazy 8 project. *Id.* at 5a; 51a; 111a.

4. The First Judicial District Court of Nevada affirmed the administrative decision of the Commission on Ethics, holding that Nev.Rev.Stat. §§ 281A.420(2) (2007) and (8)(e) (2007) were not unconstitutionally vague and overbroad, and that the state's interest in securing the ethical performance of governmental functions outweighed Carrigan's rights to free speech and political association under the *Pickering* balancing test. Pet. App. 81a; 70a; 63a.

5. In a 5-1 decision, the Nevada Supreme Court reversed, invalidating Nev.Rev.Stat. § 281A.420(8)(e) (2007) as unconstitutionally overbroad.[3] Pet. App. 1a-17a. Noting that the "dissent misunderstands the pertinent issue raised in this appeal," the majority explained that it had not found that the Legislature "can never require recusal," but that the statute in question failed to provide "sufficient limitations and explanations concerning when recusal is required." *Id.* at 7a-8a. Because the majority determined that voting by elected officials is a "core legislative function" that "serves an important role in political speech," it concluded that voting by elected official "on public issues is protected speech under the First Amendment." *Id.* at 11a.

The court rejected the application of the *Pickering* balancing test to the rights of elected officials, holding instead that "[a] strict scrutiny standard applies to a

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[3] Chief Justice Parraguirre voluntarily recused himself from participation in the decision. Pet. App. 1a.

statute regulating an elected public officer's protected political speech of voting on public issues." *Id.* Finding that Nev.Rev.Stat. § 281A.420(8)(e) (2007) "does not inform or guide public officers as to what relationships require recusal," the Nevada Supreme Court concluded that the "catch-all" provision "is substantially overbroad, sweeps within its control a vast amount of protected speech, and violates the First Amendment." *Id.* at 17a.

REASONS FOR DENYING THE WRIT

I. The Nevada Supreme Court Correctly Applied Strict Scrutiny to an Unconstitutionally Overbroad State Statute That Impermissibly Restricts Protected Political Speech

A vote cast by an elected representative on a legislative measure exists at the confluence of all other types of political speech. The decision to run for elected office, the expression of policy choices that form a candidate's political platform, monetary contributions given in support of the candidate, political association and volunteerism, independent expenditures made to promote a particular viewpoint and individual citizens ultimately choosing one candidate over the others on election day finally culminate in a singular moment - thousands of citizens speaking in unison through their popularly elected representative as he votes "yea" or "nay" on a matter of legislative policy. Legislative voting by an elected official is the essence of self-government and the foundation of the American Republic; it is the pinnacle of political speech. *See* The Federalist No. 10 (Madison) (discussing the advantages of a republic over a pure democracy in protecting individual liberty from majority rule).

A. Legislative Voting by Elected Representatives is Widely Recognized as Protected Political Speech

Voting on legislative measures has been recognized by this Court as "the individual and collective expressions of opinion within the legislative process." *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979). Legislators are given the widest latitude to express their views on issues of policy, *Bond*, 385 U.S. at 135-136, because an elected representative's vote not only mechanically disposes of proposed legislation, but registers "the 'will, preference, or choice' of an individual legislator on an issue of concern to the political community." *Clarke v. United States*, 886 F.2d 404, 411 (D.C. Cir.1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir.1990) (quoting *Montero v. Meyer*, 861 F.2d 603, 607 (10th Cir.1988), *cert. denied*, 492 U.S. 921 (1989)). In fact, "[t]here can be no more definite expression of opinion than by voting on a controversial public issue." *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir.1989). That Carrigan's vote occurred in the heat of a controversial land use decision only strengthens the protection afforded to Carrigan's expression: urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.[4] *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

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[4] The First Judicial District Court of Nevada recognized that during Carrigan's campaign for reelection in 2006, "the predominant campaign issue was the Lazy 8 project, and the public and the media focused most of their attention on that project." Pet. App. 45a.

This Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)), and legislative voting by an elected representative is unquestionably protected conduct under the First Amendment. See, e.g., *Blair v. Bethel School District*, 608 F.3d 540, 545 (9th Cir.2010) (quoting *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir.1995)) ("the status of public officials' votes as constitutionally protected speech is established beyond peradventure of doubt"); *Velez v. Levy*, 401 F.3d 75, 97-98 (2d Cir.2005) (explaining that publicly elected school board member's votes and positions are clearly protected speech); *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir.1999) ("[t]here is no question that political expression such as a [city council member's] positions and votes on City matters is protected speech under the First Amendment"); *Miller v. Town of Hull*, 878 F.2d at 532 ("we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment"); *Clarke*, 886 F.2d at 412 ("there is no question that the votes of Council members qualify as speech").

B. Nev.Rev.Stat. § 281A.420(2)(c) is a Content-Based Restriction on Political Speech

The government may not regulate speech based on its substantive content or the message it conveys, and may not preclude speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819,

828 (1995). Nev.Rev.Stat. § 281A.420(2)(c) (2007) is a content-based restriction on protected speech because it is based on relationships or circumstances that, in the Commission's view, influence or motivate elected officials to vote *in a particular way*. In other words, the practical concern and justification for the abstention requirement is the content of the message conveyed if elected officials were allowed to cast votes that the Commission deemed to be improperly based on particular motivating ideologies or perspectives created by certain relationships. A content-based restriction on protected speech is subject to strict scrutiny. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

Moreover, Nev.Rev.Stat. § 281A.420(2) (2007) explicitly bars elected officials in Nevada from advocating for or against legislative measures that they are precluded from voting on. This blanket restriction on protected speech is analogous to the "announce clause" contained in the State of Minnesota's Code of Judicial Conduct[5] which was struck down by this Court as an impermissible content-based regulation that burdened a category of speech "at the core of our First Amendment freedoms." *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002). "[T]he proper test to be applied to determine the constitutionality of such a restriction is... strict scrutiny." *Id.*

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[5] In *Republican Party of Minnesota*, the Court considered the constitutionality of Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000) which precluded candidates for judicial office in Minnesota from "announcing his or her views on disputed legal or political issues." 536 U.S. at 768.

C. The *Pickering* Balancing Test is an Inapposite Tool for the Constitutional Evaluation of State-Imposed Restrictions on the Political Speech of Elected Representatives

Contrary to the reasoning of the Commission on Ethics, there is a very real and meaningful difference between the limited protection the First Amendment provides to the speech of ordinary employees of the government and the nearly absolute protection the First Amendment provides to the speech of elected officials. Job-related speech by public employees is less protected than other types of speech because the employee's speech rights must be balanced with the government's need, *as an employer*, to supervise and discipline employees in order to ensure efficient operation of government.[6] *See Pickering v. Board of*

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[6] In *Pickering*, the Court held that the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern, and established a balancing test to determine whether restrictions imposed on the speech and associational freedoms of government employees by the government as an employer are constitutional. 391 U.S. at 568. However, the *Pickering* test is an inapposite tool in the case at hand - not only is Carrigan not an "employee" of the State of Nevada or the Nevada Commission on Ethics, but when Carrigan casts a vote on a matter before the Sparks City Council, he is not speaking as a private citizen or an employee of a governmental entity, but as the elected and representative voice of the citizens residing in the Fourth Ward of the City of Sparks. *See Clarke*, 886 F.2d at 416 (use of *Pickering* balancing test is "obviously wrong" when applied to votes of elected legislators rather than governmental employees); *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000) (rejecting application of *Pickering* to an elected member of school board of trustees).

Education, 391 U.S. 563 (1968) (emphasis added). But when the state acts as a sovereign, rather than as an employer, its power to limit First Amendment freedoms is much more attenuated. *See Waters v. Churchill*, 511 U.S. 661, 671-672 (1994) ("[t]he government as employer indeed has far broader powers than does the government as sovereign."). A state's interest in regulating speech as a sovereign is "relatively subordinate... [as] [t]he government cannot restrict the speech of the public at large just in the name of efficiency." *Id.* at 675. No previous decision of this Court regarding the level of constitutional protection afforded to the speech activities of public employees qualifies or limits the First Amendment's protection of elected government officials' speech.[7]

In fact, this Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general. For example, in *Bond*, 385 U.S. 116 (1966), the Court held that state action excluding a state representative from membership in the legislature because of his statements criticizing the policy of the federal

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[7] In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) the Court declined to rule on the constitutionality of restrictions on the First Amendment rights of elected officials. Citing its policy of "avoiding unnecessary constitutional issues," the Court limited its holding to the litigants - lower level employees of the executive branch - suggesting that the government "conceivably might advance a different justification for an honoraria ban limited to more senior officials, thus presenting a different constitutional question" than the one decided by the Court in *National Treasury Employees Union*. *Id.* at 478.

government in Vietnam and the operation of the selective service laws violated his right of free expression under the First Amendment. In *Wood v. Georgia*, 370 U.S. 375 (1962), the Court held that out-of-court statements by a sheriff questioning the advisability of a grand jury investigation into block voting by black citizens did not present a clear and present danger to the administration of justice, and, therefore, the use of the contempt power to punish the sheriff for the statements abridged his right of free speech. The Court emphasized that "[t]he role elected officials play in our society makes it all the more imperative that they be allowed to freely express themselves on matters of current public importance." *Id.* at 395.

Elected officials are obligated to take positions on public issues in order to guarantee meaningful representation in governmental debates for the electorate at large. *See Bond,* 385 U.S. at 136-137. As such, restrictions on an elected official's ability to perform his duties implicate the interests of two distinct parties: the individual legislator's First Amendment rights; and the voters' right to be meaningfully represented by their elected officials. *See Peeper v. Callaway County Ambulance Dist.*, 122 F.3d 619, 623 (8th Cir.1997). Where state-imposed restrictions prevent an elected official from meaningfully representing the voters who elected the official, the restrictions are subject to strict scrutiny. *Id.* at n.5.

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Voting on legislative measures by elected representatives is the ultimate form of political speech.

As such, the protection afforded to the legislator by the First Amendment is at its zenith. Content-based restrictions that preclude elected officials from voting on legislative measures thereby silencing the electorate are subject to strict scrutiny under the First Amendment. The Nevada Supreme Court properly struck down Nev.Rev.Stat. § 281A.420(8)(e) (2007) as unconstitutionally overbroad.

II. There is No Genuine Split of Authority over Whether and How the First Amendment Applies to Regulation of Legislative Voting by Elected Public Officials

The decision below does not conflict with the rulings of the First, Second, Seventh, Eighth or Ninth Circuit Courts of Appeal. The Commission's effort to manufacture an inter-circuit disagreement is unpersuasive; the holdings of the courts below, and the distinctions drawn therein, are entirely consistent with the conclusion of the Nevada Supreme Court that state-imposed restrictions on legislative voting by elected representatives are subject to strict scrutiny under the First Amendment.

In *Mullin v. Town of Fairhaven*, 284 F.3d 31, 41 (1st Cir.2002), the First Circuit rejected the argument that *appointed* members of a town conservation commission were entitled to First Amendment protection when the commissioners unlawfully voted to reorganize the leadership positions of the commission. The First Circuit employed the *Pickering* balancing test but explicitly limited its decision to appointed, rather than elected, public officials: "[i]n their capacity as public officials voting on matters of public concern, plaintiffs retain First Amendment

protection 'so long as [their] speech does not unduly impede the government's interest... in the efficient performance of the public service it delivers through' its *appointed* officials." *Id.* at 37 (emphasis added) (quoting *O'Connor v. Steeves*, 994 F.2d 905, 912 (1st Cir.1993)). In fact, the only discernable time that the First Circuit has considered the First Amendment rights of *elected* officials, the court easily resolved the dispute in favor of preserving the First Amendment rights of elected representatives without applying a balancing test of any kind: "we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment," *Miller*, 878 F.2d at 532.

The Commission's assertion that the decision of the Second Circuit in *Camacho v. Brandon*, 317 F.3d 153 (2d Cir.2003) stands for the premise that "restrictions affecting a city council member's voting freedom are properly analyzed 'under *Pickering*,'" is similarly unavailing. Pet.14-15. *Camacho* concerned the firing of an appointed employee of a city council member, not a restriction on that elected official's right to free speech.[8] Accordingly, the holding in *Camacho* is

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[8] Moreover, the Commission's conclusion that the Second Circuit applied the *Pickering* balancing test to the vote of an elected representative in *Camacho* is a drastic and misleading oversimplification of the holding. In *Camacho*, a legislative aide to a city council member was fired by the city council, allegedly in retaliation for the manner in which his boss, a council member, had voted on a particular measure before the Council. *Camacho*, 317 F.3d at 156-158. The employee then brought a third-party First Amendment claim against the other council members on behalf of his former supervisor. *Id.* It is well established that the

inapplicable to the situation at issue in this case - as the Second Circuit explained in *Velez v. Levy*: "[t]he official in *Camacho* remained free to express his views in the council chamber, to cast votes, and to serve his constituents in his capacity as a member of the council even after his assistant was terminated." 401 F.3d at 97.

A more accurate illustration of the Second Circuit's recognition of the First Amendment protections afforded to elected officials is set forth in *Velez*, where the court considered whether the First Amendment protected an elected official against removal from her position on a school board in retaliation for her votes on particular policy issues. *Id.* at 80-84. Rather than analyze the matter under *Pickering*, or as an employment retaliation suit as in *Camacho*, the court surmised that the votes of elected officials are entitled to robust protection under the First Amendment, and concluded:

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political affiliations and the expressions of non-elected "policymaking" public employees are not constitutionally protected from government retaliation. *Elrod v. Burns*, 427 U.S. 347, 367-368 (1976); *Branti v. Finkel*, 445 U.S. 507, 517-518 (1980). In *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir.1997), the Second Circuit concluded that when the employee is a "policymaker," there is generally no First Amendment violation in retaliation cases in which the government's retaliation is motivated by both political association unprotected under the *Elrod/Branti* decisions and expression protected under *Pickering*. As a result of *McEvoy*, the court in *Camacho* rejected the employee's First Amendment retaliation claim out of hand because of the elected official's "policymaker" status, and then noted that the elected official's vote would have been protected speech under *Pickering* without actually applying the balancing test. *Camacho*, 317 F.3d at 162.

> [w]e cannot permit a state official to oust an elected representative of the people on the bald ground that she voices unsympathetic political views - that is, that she engages in an activity that is at the core of what is protected by the First Amendment. Such an action by a state official, if allowed, would offend the basic purposes of the Free Speech clause - the facilitation of full and frank discussion in the shaping of policy and the unobstructed transmission of the people's views to those charged with decision making. *Id.* at 97-98.

Noting that this conclusion was not discordant with the court's earlier holdings, the court revisited *Camacho*, and its concurring opinion authored by Chief Judge Walker, and explicitly distinguished the broad First Amendment protections afforded to elected officials from the rights retained by ordinary public employees. *Id.* at 98

The Ninth Circuit has also recognized that "the free speech rights of elected officials may well be entitled to broader protection than those of public employees generally," and that "[l]egislators are given 'the widest latitude to express their views *on issues of policy*.'" *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir.2000) (emphasis added) (quoting *Bond*, 385 U.S. at 136). In *DeGrassi*, the circuit court concluded that a former city council member's First Amendment rights were not violated when she was prevented from participating in a series of closed council meetings because the matter considered at those meetings did not relate to "issues of policy or to any matter of political, social or other concern to the community," and the council member was not otherwise precluded

from speaking out in public on the issue, directly with other council members, or representing her constituents.[9] *Id.*

The vote at issue in this case involved issues of legislative policy of the utmost importance to the community at large - whether non-restricted gaming was appropriate along a major thoroughfare outside the downtown corridor of the City of Sparks. The project at issue is located in the City's Fourth Ward, which Carrigan is elected to represent, and a majority of the constituency of the Fourth Ward "favored the Lazy 8." Pet. App. 99a. In fact, the First Judicial District Court of Nevada recognized that "[d]uring Councilman Carrigan's 2006 reelection campaign, the

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[9] The Commission on Ethics suggests that the Ninth Circuit's conclusion in *DeGrassi* represents an intolerable split of authority between Nevada's state and federal courts. Pet. 15-16. Although Nevada has waived common law sovereign immunity for itself and its political subdivisions in its own courts, it has not waived its Eleventh Amendment protection from suit in federal court. See Nev.Rev.Stat. § 41.031 (2003). The Ninth Circuit has repeatedly held that under this statute Nevada retains immunity from suit in federal court under the Eleventh Amendment. *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir.1999) (Nevada Gaming Control Board); *Austin v. SIIS*, 939 F.2d 676, 678 (9th Cir.1991) (State Industrial Insurance System). As a result of these decisions, the United States District Court for the District of Nevada concluded, the day before the instant petition for certiorari was filed, that the Nevada Commission on Ethics has sovereign immunity as an agency of the State of Nevada. *Williams v. Clark County Public Administrator*, No. 2:09-cv-00810-RCJ-LRL, 2010 WL 4340654 (D.Nev. Oct. 26, 2010). Accordingly, the Commission's suggestion that a conflict exists between the state and federal courts of Nevada is unfounded for a very simple reason - the Eleventh Amendment precludes suit against the State of Nevada and the Nevada Commission on Ethics in federal court.

predominant campaign issue was the Lazy 8 project, and the public and the media focused most of their attention on that project." Pet. App. 45a. In Nevada, if a public officer is required to abstain from voting under Nev.Rev.Stat. § 281A.420(2) (2007), he is also precluded from advocating for the passage or failure of that measure. Therefore, the restriction imposed by the Nevada Commission on Ethics in this case does implicate a matter of legislative policy, is a complete restriction on meaningful and effective political speech, deprives an elected official of the opportunity to represent his constituents in a meaningful fashion and strips the citizens represented by the silenced legislator of their voice in local government.

In *Risser v. Thompson*, 930 F.2d 549 (7th Cir.1991), the Seventh Circuit examined the partial veto provision of the Wisconsin Constitution. However, because *Risser* did not involve a state-imposed restriction on the ability of an elected official to vote on legislative measures, the holding is inapplicable to the matter now before the Court.

Finally, the Commission's summation of the Eighth Circuit's holding in *Peeper v. Callaway County Ambulance Dist.*, 122 F.3d 619 (8th Cir.1997) is fundamentally inaccurate. In *Peeper*, the Eighth Circuit applied the rational-basis test to invalidate partial restrictions on the political speech of an elected official on equal-protection grounds. *Id.* at 624-625. In stark contrast to the Commission's assertion, the Eighth Circuit explicitly declared that "limitations on an elected official's participation in the proceedings of a public body... would require us to apply strict scrutiny," because "limitations on an officeholder... provide voters no opportunity to be heard through an

alternative representative. If the restrictions prevent the officeholder from meaningfully representing the voters who elected the official, *such restrictions are subject to strict scrutiny." Id.* at 623 n. 4; n.5 (emphasis added). Not only does Nev.Rev.Stat. § 281A.420(2) (2007) obligate public officials who are required to abstain from voting on an issue but it requires that they also refrain from advocating for the passage or failure of the measure. Therefore, the Nevada statute precludes elected officials from representing the voters in any meaningful fashion and is subject to strict scrutiny.

Contrary to the Commission's argument, there is no genuine split of authority concerning the First Amendment protection afforded to elected officials' ability to vote on legislative measures. The Commission on Ethics has failed to provide the Court with any case employing a reduced standard of constitutional scrutiny to a restriction on legislative voting by an elected official.

The Commission has similarly failed to demonstrate that a different standard of constitutional scrutiny equates to a different result in this case - even partial restrictions on the speech of elected officials have been struck down under the rational-basis test. *Id.* at 623. In fact, the only case discussed by the Commission that directly considers a state's ability to regulate elected officials' ability to vote on legislative measures is the one now before the Court. Accordingly, there is no conflict between the decision of the Nevada Supreme Court in this case and the previous decisions of the First, Second, Seventh, Eighth and Ninth Circuit Courts of Appeal.

III. State-Imposed Boundaries on Local Governments' Authority are Unaffected by the Decision Below

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). However, as the D.C. Circuit Court has concluded, once legislative authority for a municipality is ceded to a local body, the state must respect the protections afforded the local legislators by the First Amendment. *See Clarke*, 886 F.2d at 410 ("[u]nless and until Congress restructures District government to divest the Council of its legislative functions, it must respect the broad First Amendment rights that Council members enjoy by virtue of their status as legislators"). The decision below does not conflict with this principle.

In *Clarke*, 886 F.2d 404 (D.C. Cir.1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir.1990), the Circuit Court for the District of Columbia concluded that Congress could not compel the popularly elected members of the Council of the District of Columbia to enact a particular piece of legislation. The court explained that Congress' authority over the structure of local government in the District of Columbia "is not boundless," and that when Congress created a democratic form of government within the District, it vested legislative power of the local government in the Council. *Id.* at 410. Similarly, the Nevada Legislature has vested the legislative power of the City of Sparks in the Sparks City Council. *See* Sparks City Charter § 2.010, Chapter 470 Statutes of Nevada (1975). Accordingly, a state statute that obligates members of

the Sparks City Council to refrain from advocating, vote in a particular way, abstain from voting, or imposes an affirmative requirement that a member cast a vote at all exists in conflict with the First Amendment.[10]

The cases relied on by the Commission on Ethics do not oppose this conclusion. *See City of Cambridge v. Attorney General*, 571 N.E.2d 386, 390 (Mass.1991) (noting that the plaintiff municipalities voluntarily accepted a state law requiring the provision of health insurance to municipal employees, and therefore could not now opt out of general state insurance mandates); *State Board of Health v. City of Greenville*, 98 N.E. 1019, 1023 (Ohio 1912) ("[t]he state does not seek to control the discretion of the municipal authorities, but, on the contrary, refuses to commit to them any discretion touching the particular matters committed to the care and control of the State Board of Health. In so far as they are charged with any duty in reference to the carrying out of the orders and directions of the State Board of Health, they are ministerial officers only..."); *Consolidated Rail Corp. v. Smith*, 664 F.Supp.1228, 1238 (1987) (holding that municipal code regarding railroad safety was preempted by federal law). Although these cases represent restrictions on municipal authority, they do not raise First Amendment concerns because they do not relate to subject matter over which the local governments in

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[10] See *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796-797 (1988) (the right to free speech "necessarily comprises the decisions of both what to say and what not to say"); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (an individual has a right not to be made an "instrument [of]... an ideological point of view he finds unacceptable").

question had any power, and therefore do not affect local elected officials' ability to meaningfully represent their constituents. Similarly, state laws governing the lowest responsive bid for public projects and federal conditional spending programs do not restrict the ability of local public officials to vote in a particular way - local officials are free to vote for or against the award of a bid or the acceptance of federal funds as they see fit. *See California v. United States*, 104 F.3d 1086 (9th Cir.1997) (rejecting claim that conditional federal assistance eliminates voluntary choice).

IV. The Commission Has Identified Only One Other State Which Employs a "Catch-All" Provision Similar to Nev.Rev.Stat. § 281A.420(8)(e) (2007)

Where a governmental agency is given unfettered discretion to restrict speech, First Amendment freedoms are threatened by the possibility of arbitrary application. It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Many states' requirements for recusal are exceptionally broad, including Nevada's other disqualifying relationships. *Compare* Nev.Rev.Stat. § 281A.420(2)(b) (2007) (a public official may not vote on a matter in which he has a "pecuniary interest") *with* Va. Code Ann. § 30-108 (2001) ("A legislator who has a personal interest in a transaction shall disqualify himself from participating in the

transaction").[11] In the decision below, the Nevada Supreme Court left Nev.Rev.Stat. § 281A.420(2) (2007); and Nev.Rev.Stat. § 281A.420(8)(a)-(d) (2007) undisturbed. Pet. App. 17a. The ruling invalidates only Nev.Rev.Stat. § 281A.420(8)(e) (2007) - the "catch-all" provision - as unconstitutionally overbroad. *Id.* The Commission has identified only one other state, New Jersey, which employs a "catch-all" provision similar to Nev.Rev.Stat § 281A.420(8)(e) (2007) when restricting the First Amendment rights of elected officials, and has not shown that any other state restricts local elected officials' ability to advocate for or against a particular viewpoint the way Nev.Rev.Stat. § 281A.420(2) (2007) does. Pet. 26. Accordingly, the decision below cannot reasonably be said to affect "a large number of other states' recusal provisions" as claimed by the Commission on Ethics.

V. This Case Does Not Present an "Ideal Vehicle" to Resolve the Issue Presented for Review

The underlying appeal to the Nevada Supreme Court raised three distinct constitutional challenges to the Nevada Ethics in Government Law, two of which were not reached in the decision below: (1) that Nev.Rev.Stat. § 281A.420(8) (2007) is unconstitutionally vague; and (2) that the binding

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[11] Importantly, the Virginia law "shall not prevent any legislator from participating in the discussions and debates." Va. Code Ann. § 30-108 (2001). The Nevada law at issue in this case explicitly forbids public officials who are required to recuse themselves from voting on an issue from advocating for the passage or failure of the matter, and therefore treads more heavily on the First Amendment rights of public officials and the rights of the electorate. See Nev.Rev.Stat. § 281A.420(2)(c) (2007).

advisory opinion process established in Nev.Rev.Stat. § 281A.440 (2007) is an unconstitutional prior restraint. Pet. App. 6a. Councilman Carrigan and the Commission on Ethics are presently litigating these undecided issues before the Nevada Supreme Court in a separate dispute (Docket No. 56462). Accordingly, the statute at issue in this action may be struck down as unconstitutional for reasons independent of those presented in the instant petition and this case does not present the Court with an opportunity to cleanly resolve the constitutional infirmities of Nev.Rev.Stat. § 281A.420(8) (2007).

Reviewing this issue prior to the consideration of the other constitutional challenges associated with the matter by the Nevada Supreme Court invites incomplete discussion and increases the possibility of incongruous conclusions. Simply put, applying a different standard of review to state-imposed restrictions on the political speech of elected officials does not guarantee a different result and may not prevent the ultimate demise of Nev.Rev.Stat. § 281A.420(8) (2007) on other constitutional grounds.

CONCLUSION

The petition for certiorari should be denied.

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REPLY BRIEF

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In the Supreme Court of the United States

THE COMMISSION ON ETHICS
OF THE STATE OF NEVADA,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Despite respondent's strenuous efforts to reconcile the patchwork of First Amendment standards that courts apply to restrictions on elected officials' voting, at bottom, it cannot be denied that the courts are deeply and intractably divided. Respondent does not even attempt to deny that this is an important issue—indeed, he acknowledges its importance. Even if he did not, a group of states representing every state in the Fifth Circuit (which has embraced strict scrutiny for such regulations), plus states from the Sixth, Ninth, Tenth, and Eleventh Circuits, note the "uncertainty and confusion" affecting state entities "charged with implementing these critical state ethics laws as well as * * * the officials subject to them." Brief of Florida et al. ("States Br.") 12. Given the undeniable importance of this issue to state ethics enforcement, years of uncertainty over the proper standard, and the conflicting standards applicable in Nevada under Ninth Circuit and Nevada Supreme Court precedent, review is plainly warranted.

A. The Split Is Real

Respondent maintains that there is no conflict about the standard applicable to restrictions on voting by elected officials, contending that "the distinctions drawn [by various courts] are entirely consistent with the conclusion of the Nevada Supreme Court that state-imposed restrictions on legislative voting by elected representatives are subject to strict scrutiny under the First Amendment." Br. in Opp. 14. Although respondent labors for seven pages to transform the current

hodgepodge of standards into a uniform national rule of strict scrutiny, his efforts do not survive even casual review. As the officials who are responsible for state ethics laws emphatically confirm, the multitude of standards has spawned pervasive "uncertainty and confusion as to the validity of their ethics laws" which will persist until this Court "grant[s] certiorari and settle[s] the split." States Br. 1.

Respondent concedes that "[t]he First Circuit employed the *Pickering* balancing test" to restrictions on the voting of public officials (Br. in Opp. 14) in *Mullin* v. *Town of Fairhaven*, 284 F.3d 31, 41 (2002), but claims that decision is "entirely consistent" (Br. in Op. 14.) with the decision below because that case involved *appointed* officials and, respondent claims, the First Circuit affords greater protection to *elected* officials. But in *Stella* v. *Kelley*, 63 F.3d 71 (1995), a case *Mullin* itself repeatedly cited with approval (see 284 F.3d at 37, 38 n.7, 41 n.9), the First Circuit squarely rejected the idea that "the First Amendment right at issue applies less broadly to appointed officials as contrasted with elected officials," calling it "a distinction without a difference," and "a wholly artificial dichotomy." 63 F.3d at 76. The First Circuit concluded that voting by appointed public officials on a municipal zoning board was "constitutionally protected speech." *Id.* at 75. But while respondent claims that *all* circuits agree that the protection afforded voting is "nearly absolute" (Br. in Opp. 11), the First Circuit concluded that "[t]his protection is far from absolute," and that "public officials voting on matters of public concern * * * retain First Amendment protection 'so long as

[their] speech does not unduly impede the government's interest[s].'" 284 F.3d at 37 (quoting *O'Connor* v. *Steeves*, 994 F.2d 905, 912 (1st Cir. 1993)).

Respondent claims that *Camacho* v. *Brandon*, 317 F.3d 153 (2d Cir. 2003), is "inapplicable" (Br. in Op. 16) because it "concerned the firing of an appointed employee of a city council member, not a restriction on that elected official's right to free speech." *Id.* at 15. But as explained in the Petition (Pet. 14-15 & n.6), because the employee was terminated "in retaliation for the vote cast by [the] City Council member," 317 F.3d at 155, the employee's claim was derivative of the elected official's and "must succeed or fail based on whether [the official's] activities enjoyed the protection of the First Amendment." *Id.* at 160. The Second Circuit *explicitly held* that action taken against an elected public official for "[v]oting on public policy matters" (*ibid.*) was subject to "*Pickering* balanc[ing]." *Id.* at 161. Nothing in *Velez* v. *Levy*, 401 F.3d 75 (2d Cir. 2005), affects that conclusion. *Velez* "involve[d] the *outright removal* of the board member * * * from her office," completely stripping her ability to vote on *every* issue, "based on [her] political views." *Id.* at 97-98 (emphasis added). The permanent removal of an official "in retaliation for her [views]" (*id.* at 97) is a far cry from a content-neutral recusal requirement.

The Eighth Circuit has explicitly "disagree[d] that strict scrutiny applies to" such recusal requirements, and instead applied rational basis review to review a resolution that "directed [a board member] to recuse herself" from matters in which her husband had an

interest. *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 621-623 (1997). Respondent attempts to cloud that straightforward holding through ellipses-laden quotation of dicta in footnotes, all of which addressed what might happen if greater restrictions had been imposed, namely "[i]f the restrictions prevent[ed] the officeholder from meaningfully representing the voters," *id.* at 623 n.5, or if restrictions were placed on her ability to vote or speak as any other citizen might regarding the board. *Id.* at 623 n.4.[1] But no such restriction is at issue here either. Respondent's rights to participate in politics as a citizen have not been infringed, and he provides no reason to believe that the Eighth Circuit would conclude that restricting a legislator's ability to cast a vote on a matter championed by his campaign manager would prevent him from "meaningfully representing the voters" as a general matter. Indeed, the Eighth Circuit said that strict scrutiny would not apply where restrictions "only limit[] [the member's] participation as a member of the Board." *Ibid.* So it is here.

Respondent does not contest that the Seventh Circuit has held that legislative voting is not speech and that restrictions that affect voting are subject to

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[1]Although, as respondent notes (Br. in Opp. 20), *Peeper* invalidated the recusal restrictions under rational-basis review, that was because they extended well beyond ones "related to her husband" and thus "d[id] not rationally relate to" valid interests in avoiding conflicts of interest. 122 F.3d at 624. The same cannot be said for the restrictions here, which directly relate to preventing officials from voting on matters in which persons to whom they are closely connected have an interest.

rational-basis review. See *Risser* v. *Thompson*, 930 F.2d 549, 553 (1991). Respondent does not explain why that conclusion is "inapplicable" here, Br. in Opp. 19, given the obvious implication that that court employs a lower standard of review for challenges like his. And respondent has no response whatever to our observation (Pet. 17 n.8) that the Seventh Circuit applies *Pickering* balancing to restrictions on elected officials' *pure speech*. See *Siefert* v. *Alexander*, 608 F.3d 974, reh'g en banc denied, 2010 U.S. App. LEXIS 18163 (Aug. 31, 2010), pet. for cert. filed, 10-405 (filed Sept. 22, 2010).

Respondent does not dispute that the Ninth Circuit applied *Pickering* balancing to review the exclusion of an elected legislator from meetings "[b]ecause of the potential conflict between [her] role as a Council member and her personal interest" in the matter under discussion. *DeGrassi* v. *City of Glendora*, 207 F.3d 636, 646 (2000). He contends that *DeGrassi* is distinguishable because those restrictions did not prevent the legislator "from speaking out in public on the issue, directly with other council members, or representing her constituents." Br. in Opp. 18. But the same is true of respondent. He participated fully in the City Council's deliberations on the Lazy 8 at its August 2006 meeting, and there is no suggestion he was restrained from addressing his constituents. The Commission later censured respondent *only* for "*not abstaining from voting* on the Lazy 8 matter," Pet. App. 112a (emphasis added), not because of any statements he made. The restriction on voting is the sole reason the court below applied strict scrutiny, and the sole basis on which it invalidated the statute.

Id. at 3a, 10a-11a. Nothing in *DeGrassi* even remotely suggests that the Ninth Circuit would have applied strict scrutiny when faced with the facts presented here.

As we noted in our petition (Pet. 15-16), the difference in standards employed by the Ninth Circuit and the Nevada Supreme Court creates an intolerable situation where the standard for deciding challenges to the same ethics law depends on the court in which an action is filed. The best response that respondent can offer (Br. in Opp. 18 n.9) is that the Commission *itself* will not be subject to inconsistent judgments because the State of Nevada has not waived sovereign immunity so it cannot be sued in federal court in its own name. This response essentially concedes the existence of a conflict in legal standards. While technically correct, it is misleading and misses the point. As respondent's authority (*ibid.*) itself notes, entities such as the Commission *are* subject to conflicting standards because "[s]tate employees sued in their individual capacities for injunctive relief * * * are not protected by [the] state's Eleventh Amendment immunity." *Williams* v. *Clark Cnty. Pub. Adm'r*, No. 2:09-cv-00810-RCJ-LRL, 2010 U.S. Dist. LEXIS 115008, *11 (D. Nev. Oct. 26, 2010). This untenable situation requires this Court's intervention. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994).

As the state *amici* attest, "confusion among the circuits as to the appropriate test for laws regulating public officials' voting casts a shadow of uncertainty over the validity of [recusal] provisions," States Br. 4, which affects "the parties charged with implementing

these critical state ethics laws as well as * * * the officials subject to them." *Id.* at 12.

B. Restrictions On Legislative Voting Are Not Subject To Strict Scrutiny

Respondent's defense of the judgment rests on twin propositions: first, that legislative voting represents "the pinnacle of political speech" (Br. in Opp. 7); and second, that restrictions on such speech are subject to strict scrutiny. The first proposition finds no support in this Court's precedents; the second is flatly wrong.

Respondent begins by claiming that legislative voting is "widely recognized as protected political speech" under the First Amendment. Br. in Opp. 8 (capitalization omitted). Tellingly, he cites no precedents of this Court that establish this "widely recognized" principle. The passage he cites from *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 (1979)), see Br. in Opp. 8, merely states that *federal* legislative voting is immune from civil liability under the *Speech or Debate Clause*, which suggests that congressional voting is safeguarded as part of the "legislative process" protected by that Clause rather than as a form of expression protected by the First Amendment. The cited passages in *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966), and *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949), see Br. in Opp. 8, involve penalties for *pure speech* (speech criticizing the Vietnam War and speech criticizing political and racial groups, respectively), not voting. Respondent gives no reason to question Justice Scalia's recent observation that there is "no precedent from this Court holding that legislating is protected by the

First Amendment." *Doe* v. *Reed*, 130 S. Ct. 2811, 2833 (2010) (Scalia, J., concurring in judgment).

Even if legislative voting were considered to have an expressive component, it does not follow that restrictions on it would be subject to strict scrutiny. As explained in our petition, Pet. 18-23, every relevant line of precedent counsels applying a lower standard, whether legislative voting is considered expressive conduct, the speech of a government official or employee, or conduct akin to a citizen's vote. As outlined above, most courts of appeals that have held that voting has an expressive element have nonetheless rejected application of strict scrutiny to restrictions on it. See pp. 2-6, supra.

In a strained effort to argue that strict scrutiny is warranted here, respondent repeatedly invokes nongermane lines of First Amendment doctrine. For example, he alleges the Commission has "unbridled discretion" and engages in "arbitrary application" of recusal standards, concepts borrowed from prior restraint doctrine, Br. in Opp. 3-4, 23, though there is no allegation in this case, much less a finding, that the Commission has applied the recusal rules arbitrarily. He also argues that restrictions on pure speech and the ability to "take positions on public issues" (*id.* at 10, 13, 24 & n.11) warrant strict scrutiny, although there is no dispute that respondent freely expressed his views on the Lazy 8 matter, and although the Commission censured him for "not abstaining from *voting* on [it]," Pet. App. 112a (emphasis added), rather than for of any statement he made. The restriction on voting is the sole basis

on which the court below invalidated the statute. *Id.* at 3a, 10a-11a.

The most outlandish of all respondent's feints is his contention that the recusal provision here is "a content-based restriction on protected speech." (Br. in Opp. 10). But the recusal obligation here is no more content-based than a recusal obligation for matters where the legislator has a direct personal conflict (or even an anti-bribery law). The law is tied not to the content of the speech but the nature of the official's relationship to interested parties. As Justice Pickering noted below, without contradiction by the majority, the statute is "content-neutral. It regulates *when* an official may or may not vote, not *how* he or she should vote." Pet. App. 36a.

C. The Current Uncertainty Has Grave Implications For States' Recusal Requirements

As noted in our petition (Pet. 23-29), decisions deeming regulation of elected officials' voting to be restrictions on speech subject to strict scrutiny render "presumptively invalid" (*R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992)) a host of state recusal statutes and common-law recusal schemes. Tellingly, respondent says *nothing whatever* (Br. in Opp. 23-24) to dispute that such decisions have created uncertainty about the validity of longstanding common-law recusal rules. Nor can he. Compared to the detailed and specific provisions of Section 281A.420(8)(e), which only extends to relationships that are "substantially similar" to one of four narrowly defined types, common-law recusal standards are far more general, and their precise

contours are developed through case-by-case adjudication. Some require disqualification based on such broad standards as "indirect personal interest." *Hanig* v. *City of Winner*, 692 N.W.2d 202, 208-209 (S.D. 2005). See generally Pet. 27-29. Further review is warranted simply to dispel the cloud of uncertainty cast on this important body of law by the decisions of the court below and the Fifth Circuit.

Respondent makes a token effort to address the uncertainty surrounding the validity of state recusal statutes, contending that "only" New Jersey "employs a 'catch-all' provision similar [to Nevada's]." Br. in Opp. 24.[2] But respondent's strained distinction is of no moment, because strict scrutiny would apply to *all* recusal statutes, not simply those that are similar to section 281A.420(8)(e) in some respect. The uncertainty thus extends much more widely. As respondent notes, "*[m]any states' requirements for recusal are exceptionally broad.*" Br. in Opp. 23 (emphasis added). See, *e.g.*, N.J. Admin. Code § 19:61-7.4(f) (2010) (requiring recusal whenever an "incompatible financial or personal interest may exist in other situations which are not clearly within the provisions * * * above, depending on the totality of the circumstances"); N.C. Gen. Stat. § 138A-37(a) (2006) ("no legislator shall participate in legislative action if the legislator knows the legislator or *a*

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[2] Respondent's characterization of Section 281A.420(8)(e) as a "catch all" is mistaken; the provision "is not free-standing" but instead requires recusal *only* on matters where a relationship is "substantially similar" to the other specifically enumerated "disqualifying [ones] (household, family, employment, or business)." Pet. App. 38a (citation omitted).

person with which the legislator is associated may incur a reasonably foreseeable financial benefit from the action") (emphasis added). *See also* States Br. 16. *Every* recusal law, whether or not "exceptionally broad" (Br. in Opp. 23), would be "presumptively invalid" (*R.A.V.*, 505 U.S. at 382), such that it would only "rarely" survive constitutional review. *Burson* v. *Freeman*, 504 U.S. 191, 200 (1992).

Although respondent makes a perfunctory effort to question whether the application of strict scrutiny makes a difference, Br. in Opp. 20, he elsewhere recognizes that "there is a very *real and meaningful* difference between the limited protection" afforded by *Pickering* (and lower standards) and "the *nearly absolute* protection" of strict scrutiny. Br. in Opp. 11 (emphasis added). Because of the pall this uncertainty casts over state recusal laws, there can be little question that this case presents an issue of exceptional importance. Cf. Texas Pet. for Reh'g En Banc at 14, *Rangra* v. *Brown*, No. 06-51587 (5th Cir. filed May 8, 2009) (successfully seeking en banc review of decision holding that Texas Open Meetings Act was subject to strict scrutiny as an infringement of elected legislators' speech, noting "nationwide importance" of issue).

D. No Vehicle Problem Would Prevent Resolution Of The Issue

Respondent does not contest that this case squarely presents a single issue that was thoroughly litigated below and about which there remain no disputes concerning the facts, application of state law, or jurisdiction. See Pet. 32. The sole vehicle problem respondent could contrive is that another

case involving the state ethics law was (at the time his brief in opposition was filed) pending in the Nevada Supreme Court. That case involved a Commission advisory opinion concerning a different Council vote and a different recusal provision. See Docketing Statement at 6, *Comm'n on Ethics of the State of Nevada* v. *Carrigan*, No. 56462 (filed Aug 13, 2010) (stating appeal involves "the application of paragraph (d) of NRS 281A.420(8) [(2007)] [involving] 'a substantial and continuing business relationship'"). The court has since dismissed that appeal as moot. Supp. Br. of Resp. 1.

Respondent's eleventh-hour claim that the Nevada Supreme Court "may * * * ultimate[ly]" invalidate Section 281A.420(8) on other grounds in some future litigation, Supp. Br. of Resp. 1, is pure speculation, and no reason for this Court to forego reviewing the exceptionally significant decision that is squarely before it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 10-568

In the Supreme Court of the United States

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

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BRIEF OF FLORIDA, ALABAMA, COLORADO, IDAHO, LOUISIANA, MISSISSIPPI, OHIO, AND TEXAS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the Nevada Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The question presented is:

Whether the First Amendment subjects state restrictions on voting by elected officials to (i) strict scrutiny, as held by the Nevada Supreme Court and the Fifth Circuit, (ii) the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), for government-employee speech, as held by the First, Second, and Ninth Circuits, or (iii) rational-basis review, as held by the Seventh and Eighth Circuits.

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Oregon v. Ice,
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Ariz. Rev. Stat. Ann. § 38-503(A) 18

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Del. Const. art. II, § 20 15

Fla. Const. art. II, § 8(g) 6

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N.D. S. Rule 321 19

Ohio Legis. Code of Ethics § 4 19

S.D. J. Rule 12-1 19

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Vt. H.R. Rule 75 18

Vt. S. Rule 71 18

Wis. Assemb. Rule 77 (2009) 19

Wis. S. Rule 73(1)(2009) 19

Other Authorities

1991 Laws of Fla. 638-639 9

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David R. Colburn, *From Yellow Dog Democrats to Red State Republicans: Florida and Its Politics Since 1940* (2007) 6

Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. Sch. L. Rev. 177 (1995) 21, 22

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Fla. Comm'n on Ethics, Ann. Rep. to the Fla. Leg. (2008) 11

Fla. Comm'n on Ethics, Ann. Rep. to the Fla. Leg. (2007) 11

Fla. Comm'n on Ethics, Ann. Rep. to the Fla. Leg. (2006) 11

Fla. Comm'n on Ethics, Frequently Asked Questions, http://www.ethics.state.fl.us/ 10

Fla. Ethics Comm'n Op. 10-08 (Apr. 21, 2010) 11

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Fla. Ethics Comm'n Op. 98-15 (Oct. 22, 1998) 11

Fla. Ethics Comm'n Op. 87-24 (Apr. 23, 1987) 11

Fla. H.R. Select Comm. on Standards and Conduct, HB 2099 (1975), Opening Remarks of John A. Grant, Jr. 8

Fla. S. Comm. on Governmental Operations, CS/SB 971 (1986) Staff Analysis 9

Office of Legis. Research, Conn. Gen. Assemb., *Voting Restrictions in State Ethics Codes* (Research Rep. No. 2000-R-0155, Feb. 2000), http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0155.htm 18

Bill Marsh, *Illinois Is Trying. It Really Is. But the Most Corrupt State Is Actually ...* , N.Y. Times, Dec. 13, 2008, *available at* http://www.nytimes.com/2008/12/14/weekinreview/14marsh.html 12

The Term Limited States, Nat'l Conference of State Legs. (June 2009), http://www.ncsl.org/default.aspx?tabid=14844 21

Voting Recusal Provisions, Nat'l Conference of State Legislatures (Oct. 2009), http://www.ncsl.org/Default.aspx?TabId=15357 14

STATEMENT OF AMICI INTEREST

The Amici States have an interest in this case because decisions imposing strict scrutiny on measures governing elected officials' voting, such as the Nevada Supreme Court's, create uncertainty and threaten the validity of similar state conflict of interest provisions. These state laws serve compelling governmental interests. For instance, Florida's provisions were enacted with the purpose of promoting integrity in government decision-making, eliminating any appearance of impropriety, and maintaining the public's confidence in both elected and appointed public officials. These statutes have been a part of Florida's Code of Ethics for Public Officials in some form for over thirty-five years; they have never been thought to be unconstitutional burdens on speech.

As petitioner notes, the law is unsettled in several States and federal circuits. Currently, four States face strict scrutiny standards, sixteen States must meet a heightened scrutiny test under *Pickering v. Board of Education*, 391 U.S. 563 (1968), eleven States are subject to only rational basis review, and the remaining nineteen States (which include Florida) are left with no firm standard. *See* 28 U.S.C. § 41 (listing States in federal circuits). Those in the latter group face uncertainty and confusion as to the validity of their ethics laws if this Court does not grant certiorari and settle the split in the courts.

Amici urge, and public policy strongly suggests, that the type of review applicable to these

ethics provisions is an important issue, worthy of this Court's resolution. It is important that ethics laws have a firm constitutional grounding and that their beneficent purposes not be undermined. As Thomas Jefferson noted, recusal laws play an integral role in the preservation of democratic governance:

> Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice has been disallowed, even after division. In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the House that this rule of immemorial observance should be strictly adhered to.

See Tex. Const. art. III, § 22, Interpretive Commentary (2007) (quoting II, The Writings of Thomas Jefferson, 368 (Library ed. 1903)).

Given the interests at stake, the Amici States urge this Court to hear this case and address the questions presented so that no doubt is cast as to the validity of their measures governing officials' voting. This Court's review will prevent the States from contending with further costly and burdensome litigation over similar free speech claims directed to their conflict of interest provisions.

SUMMARY OF ARGUMENT

This Court should accept review and reverse the decision of the Nevada Supreme Court in *Carrigan v. Commission on Ethics*, 236 P.3d 616 (Nev. 2010), which applied a strict scrutiny test under the First Amendment to the State's conflict of interest recusal law for elected officials. Consideration of whether this most rigorous standard is appropriate must take into account the important reasons why governments enact recusal laws. Namely, public officials frequently face situations where their personal and professional interests are implicated in their voting decisions. And States have an important interest in maintaining the public's confidence in the integrity of their elected officials by regulating these conflicts of interests, particularly when the act of exercising voting power is at stake.

Reflecting this importance, every State has measures regulating public officials' voting on matters in which the officials have a personal interest. At least thirty-two have provisions that require legislative officials to abstain from voting under specified circumstances. Other methods also may be employed by governments to deal with situations involving a conflict of interest between a public officer's official duties and his personal interests. For example, some States require only disclosure of the conflict. Other States require public officers to seek excusal from their respective political bodies before sitting out a vote.

The circuit and state court split creates confusion and uncertainty in an area of the law uniformly adopted by and uniquely adapted to each of the States. These individual approaches should not be subject to strict scrutiny, a test that would hinder the operation of these critical provisions. Rather, States must be able to play an active role in regulating their officials. Subjecting officials' voting provisions to strict scrutiny would effectively tie States' hands and would prevent ethics laws from evolving as necessary to suit individual States' circumstances. Such provisions demand flexibility that is contrary to the narrow tailoring requirements of strict scrutiny. The States should retain the discretion to enact these types of legislation and decide which type of legislation is best, because it is the State that is uniquely aware of its own interests, and it is the State that must deal with the consequences of unscrupulous officers.

The confusion among the circuits as to the appropriate test for laws regulating public officials' voting casts a shadow of uncertainty over the validity of these provisions. Such confusion will interfere with the States' abilities to address conflict of interest issues, which they have found to be of critical import. If the decision of the Nevada Supreme Court stands here, Florida's statutes and those of other similarly situated States will inevitably become the target of litigious public officials seeking to avoid ethics violation convictions. Accordingly, Amici urge this Court to grant certiorari review and reverse the decision of the Nevada Supreme Court.

ARGUMENT

I. Review of the Nevada Supreme Court's decision is justified to establish that state recusal provisions are not subject to strict scrutiny and thereby reduce the potential for litigation that burdens and hinders States' regulation of their government officials.

Nevada's recusal laws, like those in other States, fulfill important governmental interests by preventing corruption in government, promoting public confidence in the decision-making process, and elevating the public's faith in the integrity and impartiality of its public officers. *See* Nev. Rev. Stat. § 281A.020 (2009). Yet, in holding that recusal statutes are subject to strict scrutiny analysis under the First Amendment, the Nevada Supreme Court's opinion creates further confusion as to the validity of recusal laws in other States (such as Florida's law that has been unchallenged for over thirty-five years) and voting conflict of interest provisions that exist in every State. Accordingly, for the reasons below, Amici urge this Court to grant certiorari review and reverse the decision of the Supreme Court of Nevada in *Carrigan v. Commission on Ethics*, 236 P.3d 616 (Nev. 2010).

A. Florida's recusal laws developed as a measured response to the credibility gap between the public and its public officials.

Conflict of interest provisions are part of States' efforts to ensure integrity in government. The States have responded over time to concerns of government credibility via the enactment of various conflict of interest provisions. The gradual development of this body of state statutory and constitutional law demonstrates a refinement of ethical standards that could be called into doubt if subject to the type of strict scrutiny review applied in *Carrigan* and by the Fifth Circuit in *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007). Florida's experience in its adoption and modifications of its conflict of interest and recusal laws is representative of this development.

Since 1968, Florida's constitution has prohibited conflicts of interest, requiring the adoption of a "code of ethics for all state employees and nonjudicial officers prohibiting conflict between public duty and private interests [that] shall be prescribed by law." *See* Fla. Const. art. II, § 8(g) (2010). Concerns over corruption and a lack of openness in government led the citizens of the State, at the urging of Governor Reubin Askew and over objections of the legislature, to amend the state constitution by initiative petition in 1976 to further address ethics in government. *See* David R. Colburn, *From Yellow Dog Democrats to Red State Republicans: Florida and Its Politics Since 1940* 92-93 (2007).

Even before the constitutionalization of these principles, the Florida Supreme Court adopted a common law rule establishing that public officials should not participate in matters where they have an interest in a personal gain or loss. As early as 1935, the court recognized that a public official cannot legally participate in matters in which he is personally interested. *See Stubbs v. Fla. State Fin. Co.*, 159 So. 527, 528 (Fla. 1935). In *Stubbs*, the court explained that "[t]his principal has many times been recognized by this court and is not only founded upon a wholesome public policy, but is undergirded by the familiar scriptural quotation attributed to One 'who spoke as never man spake,' to the effect that 'no man can serve two masters.' " *Id.* (citing *Lainhart v. Burr*, 38 So. 711 (Fla. 1905); *State v. Gautier*, 146 So. 562 (Fla. 1933)). That same year, the court reiterated that:

> No principle of law is better settled than that the same person cannot act for himself and at the same time with respect to the same matter as the agent of another whose interests are conflicting. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty and, constituted as humanity is in the majority of cases duty would be overborne in the struggle.

City of Coral Gables v. Coral Gables, Inc., 160 So. 476, 479 (Fla. 1935).

In 1975, the Florida Legislature codified the common law into statute. In introducing the bill, Representative John A. Grant, Jr., emphasized the importance of legislating ethics in government. *See* Fla. H.R. Select Comm. on Standards and Conduct, HB 2099 (1975), Opening Remarks of John A. Grant, Jr. He noted that "the confidence level between the government and its citizens has reached a credibility gap of significant proportions" and stressed that it was "imperative to significantly strengthen the conflicts legislation." *Id.* Like the Nevada law at issue here, this legislation would have "require[d] public officers to abstain from voting on matters when there is a conflict of interest." *Id.*

Although the final enacted version of the law did not provide for recusal, it did require a public officer to disclose conflict on "any measure in which he has a personal, private, or professional interest which inures to his special private gain, or the special gain of any principal by whom he is retained ... ." Fla. Stat. § 112.3143 (1975). Nine years later the Florida Legislature revisited section 112.3143, amending it to reflect, in part, Mr. Grant's initial intent — to prohibit county, municipal, and other local public officers from voting in an official capacity upon any measure in which a conflict of interest existed. Fla. Stat. § 112.3143 (1984).

Since then, the Florida Legislature has continued to re-examine this section, adding amendments that have strengthened the legislation and imposed stricter requirements on public officers. For example, while the 1984 version required written disclosure of a conflict of interest by state public

officials only *after* a vote occurred (and did not address whether the public official could otherwise participate), amendments added in 1986 required "all appointed public officers to disclose any conflict of interest which would inure [to] either the officer's special private gain or the gain of any principal by whom he is retained, *prior to participation*[1] *on the matter* in which the conflict exists." Fla. S. Comm. on Governmental Operations, CS/SB 971 (1986) Staff Analysis. In 1991, the number of relationships requiring disclosure by a state public officer was expanded from just principals to relatives and business associates. 1991 Laws of Fla. 638-639. In sum, Florida's recusal statutes have slowly evolved and strengthened since their inception as a measured response to the credibility gap between Florida's officials and the public.[2]

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[1] Participate was defined as "any attempt to influence the decision by oral or written communication by the officer or at his direction." Fla. Stat. § 112.3143 (1987).

[2] Most recently, the Florida Commission on Ethics recommended that the legislature strengthen Florida's recusal statutes by requiring state officials to abstain from voting on matters where they have a conflict of interest. The Commission explained that its recommendation was triggered by instances of official conflicts and the need to promote governmental integrity:

> There have been several recently publicized situations involving local officials participating in discussions and attempting to influence agency decisions even though they had a voting conflict that precluded them from voting on the matter. One of these officials was convicted of criminal activity arising out of this conduct. In addition, the Commission has reviewed a situation where the

(Continued...)

Like the Nevada statute held unconstitutional in *Carrigan*, provisions of Florida's recusal statute can be subject to interpretation. But just because an individual officer may be unsure whether the recusal provision is triggered in a given situation, the statute is not rendered unconstitutional. Instead, in these situations, public officials simply can request an advisory opinion from the Florida Commission on Ethics, which, in turn, can clarify any uncertainty over whether an official may participate in the matter.[3] Indeed, since 1974, the Florida Commission on Ethics has issued over 2,440 advisory opinions, the majority of which have addressed a question regarding a conflict of interest or voting conflict.[4] As

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> official voted on a matter that benefited the corporate "sibling" of his employer. The law regarding voting conflicts should be tightened to cover those kinds of situations and to prohibit local officials from making any attempt to influence a decision in which they have a conflict.

Fla. Comm'n on Ethics, Ann. Rep. to the Fla. Leg. 25 (2009).

[3] *See* Fla. Comm'n on Ethics, Frequently Asked Questions, http://www.ethics.state.fl.us/ (last visited Nov. 4, 2010) ("Any public officer, candidate for public office, or public employee in Florida who is in doubt about the applicability of the standards of conduct or disclosure laws to himself or herself, or anyone who has the power to hire or terminate another public employee, may seek an advisory opinion from the Commission about himself or herself or that employee.").

[4] Each year, the Commission on Ethics issues an annual report to the Florida Legislature, part of which details the number and nature of advisory opinions issued during the previous year. According to the 2009 Annual Report, the Commission issued (Continued...)

evidenced by the opinions rendered, Florida's recusal laws are broadly applied to all types of elected and appointed officials.[5] Accordingly, whether a voting conflict exists under Florida law may require interpretation, but the broad statutory language encourages ethics awareness among Florida's public officials as well as the pursuit of advisory opinions from the Commission.

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23 advisory opinions, 18 of which addressed voting conflicts or other conflicts of interest. *See* Fla. Comm'n on Ethics, Ann. Rep. to the Fla. Leg. 13 (2009). *See also, e.g.*, Fla. Comm'n on Ethics, Ann. Rep. to the Fla. Leg. 13 (2008) (23 of 30 opinions addressed voting conflicts of other conflicts of interest); Fla. Comm'n on Ethics, Ann. Rep. to the Fla. Leg. 13 (2007) (15 of 25 opinions addressed voting conflicts or other conflicts of interest); Fla. Comm'n on Ethics, Ann. Rep. to the Fla. Leg. 13 (2006) (15 of 28 opinions addressed voting conflicts or other conflicts of interest).

[5] *See, e.g.*, Fla. Ethics Comm'n Op. 10-08 (Apr. 21, 2010) (advising city mayor that he would not encounter a voting conflict on a measure concerning a commuter rail station in the city when the benefit to his employer was speculative); Fla. Ethics Comm'n Op. 00-05 (Mar. 10, 2000) (advising that city mayor would have a voting conflict if he voted on a measure to exempt a neighborhood from a transient rental ban, where the mayor's supermarket made grocery sales to business supplying short-term tenants in the neighborhood); Fla. Ethics Comm'n Op. 98-15 (Oct. 22, 1998) (advising Tampa City Council member that he should abstain from voting on issuance of ambulance permits when, as an investment broker, the council member held a brokerage account for an individual who owns 50 percent of the stock in the company seeking the permits); Fla. Ethics Comm'n Op. 87-24 (Apr. 23, 1987) (advising state representative that a voting conflict of interest would exist if he were to vote on liquor industry legislation that would inure to his special benefit).

It is yet determined how, if at all, the First Amendment may be applied to officials' voting. Pet. 11. Free speech is an important value, but a State faced with reports of having the most corrupt officials[6] should be permitted broad latitude to craft laws that reign in public corruption and voting conflicts. For Florida and other States in the Eleventh Circuit (as well as those States in the Third, Fourth, Sixth, and Tenth Circuits), the question of the proper constitutional test in federal court for these provisions remains unresolved. If the decisions of the Nevada Supreme Court and the Fifth Circuit subjecting recusal statutes to strict scrutiny stand, Florida's ethics laws, and those of other similarly situated States, will inevitably be called into question.

Unless this Court reviews this case and establishes the appropriate test for conflict of interest provisions, those decisions will spread greater uncertainty and confusion to the parties charged with implementing these critical state ethics laws as well as to the officials subject to them. Accordingly, the Amici States urge this Court to grant certiorari review and reverse the Nevada Supreme Court because that decision threatens not only the integrity of Florida's governmental decision-making process, but that of all fifty States, as discussed below.

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[6] *See* Bill Marsh, *Illinois Is Trying. It Really Is. But the Most Corrupt State Is Actually ...* , N.Y. Times, Dec. 13, 2008, at WK3, *available at* http://www.nytimes.com/2008/12/14/weekinreview/14marsh.html (last visited Nov. 10, 2010).

B. Every State has its own requirements for voting officials facing conflicts of interest, and this Court's review would end the uncertainty as to the appropriate constitutional test for those provisions.

Every State regulates public official[7] voting at the State and local levels as to matters on which the officials have outside interests. These provisions are significant in their existence alone, because they demonstrate that the Nevada Supreme Court's decision and the split among the circuits on the proper standard of review have the potential to affect every State.

As noted earlier, conflict of interest provisions seek to prevent corruption among government officials, promote the public's confidence in the government's decision-making process, and elevate the public's faith in the integrity and impartiality of its public officers. These priorities are shared throughout the nation, as reflected by the enactment of provisions similar to Florida's throughout the States. *See, e.g.*, Alaska Stat. § 24.60.10(2)[8] ("a fair

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[7] These provisions cover all manners of public officials and employees and apply to a variety of official actions in each State's different levels and branches of government. This section focuses namely on the provisions related to the legislative branch of state governments, as well as, where set forth by state statute, local legislative officials.

[8] All statutes and rules cited are the current 2010 version, unless otherwise indicated.

and open government requires that legislators and legislative employees conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts of interest or even appearances of conflicts of interest.").

Moreover, as shown below, immense variety exists in the substance of the state statutes and regulations. This variety also supports the need for this Court's review, because the strict scrutiny favored by the Fifth Circuit and the Nevada Supreme Court is ill suited to the optimal structure in which the sovereign States are able to develop and perfect conflict of interest provisions based on their own circumstances, experiences, and concerns.

Most of the legislative conflict provisions are set out by statutes or, in the case of conflicts for state legislators, by the rules of legislative bodies. Three States — Illinois, Nebraska, and New Jersey — have only statutory provisions; six States — Indiana, Kansas, North Dakota, South Dakota, Tennessee, and Vermont — rely on rules alone. *See Voting Recusal Provisions*, Nat'l Conference of State Legislatures (Oct. 2009), http://www.ncsl.org/Default.aspx?TabId=15357 (last visited Nov. 8, 2010). New Hampshire is the only State that has no provisions dealing with the process of handling legislative conflicts of interest at the voting stage. *Id.*[9]

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[9] New Hampshire does provide by statute, however, that executive branch officials shall not participate where they have conflicts. N.H. Rev. Stat. § 21-G:22. The State also leaves it to local governments to regulate local public officials' conflicts. *Id.* § 31:39-a.

Some States even have constitutional provisions requiring legislators' recusal from voting for conflicts of interest.[10] Several States, like Florida, otherwise constitutionally require the enactment of state ethics codes.[11] By putting such provisions in their organic law, States recognize that avoiding conflicts of interest in legislating is critical to open and representative government.

Though universally adopted, the specifics of the States' conflict of interest provisions are not identical. Indeed, the variety of the provisions throughout the States reflects the varying interests and concerns as to ethics across the nation.

For example, nearly all States specify some version of financial interest as the key conflict their

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[10] *See* Cal. Const. art. IV, § 4 (any legislator "who knowingly receives any salary, wages, commissions, or other similar earned income from a lobbyist employer ... may not, for a period of one year following its receipt, vote upon or make, participate in making, or in any way attempt to use his or her official position to influence an action or decision before the Legislature."); *see also* Colo. Const. art. V, § 43; Del. Const. art. II, § 20; Ky. Const. § 57; Okla. Const. art. V, § 24; Pa. Const. art. III, § 13; Tex. Const. art. III, § 22; Wash. Const. art. II, § 30.

[11] *See* La. Const. art. III, § 9 ("Legislative office is a public trust, and every effort to realize personal gain through official conduct is a violation of that trust. The legislature shall enact a code of ethics prohibiting conflict between public duty and private interests of members of the legislature."); *see also* Mich. Const. art. IV, § 10; Mont. Const. art. XIII, § 4.

provisions address. *See, e.g.*, 65 Pa. Cons. Stat. § 1102 (defining conflict of interest as a "private pecuniary benefit"); *see also* Ala. Code § 36-25-1(8); Cal. Gov't Code § 87102.5; Me. Rev. Stat. tit. 1, § 1014; Me. Rev. Stat. tit. 30-A § 2605. But a few States speak broadly of an interest that is "private or personal." *See, e.g.*, Okla. Const. art. V, § 24 (prohibiting legislators from voting on measures in which they have a "personal or private interest"); Wyo. Stat. Ann. § 9-13-106(a) ("A public official, public member or public employee shall not make an official decision or vote on an official decision if the public official, public member or public employee has a personal or private interest in the matter.").

The States also differ in their approaches as to which officials are subject to which conflict of interest provisions. Many States direct their provisions only to the conduct of state officials and legislators. *See, e.g.*, Ark. Code Ann. § 21-8-803; Conn. Gen. Stat. § 1-79(k); 5 Ill. Comp. Stat. 420/3-202; N.M. Stat. Ann. § 10-16-2(G); Va. Code Ann. § 30-108. Some States impose concrete requirements on state officials but specifically leave the conduct of local officials to local government regulations. *See, e.g.*, Alaska Stat. § 29.20.10(a)(4) (directing each municipality to adopt a conflict of interest code); N.C. Gen. Stat. § 160A-86(a) ("Governing boards of cities, counties, local boards of education, unified governments, sanitary districts, and consolidated city-counties shall adopt a resolution or policy containing a code of ethics to guide actions by the governing board members in the performance of the member's official duties as a member of that governing board.").

Still other States' conflict of interest provisions apply across the board to both state and local officials. *See, e.g.*, Ariz. Rev. Stat. Ann. § 38-501(A) ("This article shall apply to all public officers and employees of incorporated cities or towns, of political subdivisions and of the state and any of its departments, commissions, agencies, bodies or boards."); *see also* La. Rev. Stat. Ann. § 42:1120; Md. Code Ann., State Gov't § 15-501; Minn. Stat. § 10A.07; R.I. Gen. Laws § 36-14-4. Other States, like Florida, have entirely separate provisions and requirements for state and local officials. *Compare* Ga. Code Ann. § 36-67A-2 (local government officials), *with* Ga. S. Rule 5-1.8 and Ga. H.R. Rule 134; *compare* Neb. Rev. Stat. § 49-1499 (legislative conflict provision), *with id.* § 49-1499.03 (political subdivision officials provision); *compare* N.J. Stat. Ann. § 40A:9-22.5 (local), *with id.* § 52:13D-18 (legislature); *compare* Tex. Gov't Code § 572.053 (legislature), *with* Tex. Loc. Gov't Code § 171.004 (local officials).

Finally, in a few States, different legislative rules apply even between state senate and house members. *Compare* Ind. H.R. Rule 47 ("Any member who is immediately and particularly interested in the result on any question shall ask to be excused and shall not vote on that question."), *with* Ind. S. Rule 4(b) ("A Senator, by motion, may request to be excused from voting on a question because of a direct personal or pecuniary interest in the event of such question."); *compare* Mich. H.R. Rule 31(2) (2009) ("If a Member desires to abstain from voting because of a potential conflict of interest, the Member may rise,

announce his or her intent not to vote, and reserve the right to explain the abstention."), *with* Mich. S. Rule 1.306 ("A Senator having a personal, private, or professional interest in a bill, of which he or she has knowledge, shall not vote on the bill and shall disclose in writing his or her interest in the bill.").

Critically, States also take different approaches as to the appropriate course for an official to follow when a conflict of interest occurs. Along with Florida and Nevada, at least thirty[12] other States require some form of automatic recusal in at least some circumstances for state or local legislative officials.[13] In other States, officials must

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[12] As noted in the petition, one 2000 report puts the number at thirty-seven States that require recusal for state officers and officials with a conflict of interest. Pet. 25 (citing Office of Legis. Research, Conn. Gen. Assemb., *Voting Restrictions in State Ethics Codes* (Research Rep. No. 2000-R-0155, Feb. 2000), http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0155.htm).

[13] *See, e.g.*, Ala. Code § 36-25-5; Ariz. Rev. Stat. Ann. § 38-503(A); Cal. Gov't Code § 87102.5; Colo. Const. art. V, § 43; Conn. Gen. Stat. § 1-85; Del. Code Ann. tit. 29, § 1002; Ga. Code Ann. § 36-67A-2; Iowa Code § 68B.2A; Iowa H. Rule 76; Ky. Const. § 57; La. Rev. Stat. Ann. § 42:1120; Me. Rev. Stat. tit. 30-A, § 2605; Me. H.R. Rule 401(12); Md. Code Ann., State Gov't § 15-501; Mass. H. Rule 16A(14) (2009); Mass. S. Rule 10A (2009); Mich. S. Rule 1.306 (2009); Miss. H. Rule 26; Miss. S. Rule 124; Mont. Code Ann. § 2-2-105(5); Neb. Rev. Stat. § 49-1499.03(2)(a)(iii); N.J. Stat. Ann. § 52:13D-18; N.C. Gen. Stat. § 138A-37; Ohio Rev. Code Ann. § 102.031(B); Okla. Const. art. V, § 24; Or. Rev. Stat. § 244.120(2); 65 Pa. Cons. Stat. § 1103(j); Tex. Gov't Code Ann. § 572.053; Tex. Loc. Gov't Code Ann. § 171.004; Vt. H.R. Rule 75; Vt. S. Rule 71; Va. Code Ann. § 30-108; Wash. Const. art. II, § 30; W. Va. Code § 6B-2-5(j); Wis. Stat. § 19.59; Wyo. Stat. Ann. § 9-13-106.

seek excusal from their legislative bodies to avoid voting. *See, e.g.*, Haw. H.R. Rule 60.5; Haw. S. Rule 71(2) (2009).[14] Still other States leave it to the official's discretion as to whether abstention from voting is appropriate. *See, e.g.*, R.I. Gen. Laws § 36-14-6.[15] In a few States, an official only need disclose the conflict of interest. *See, e.g.*, Mo. Rev. Stat. § 105.461.[16]

These distinctions among and within States in their conflict of interest provisions reflect the States' unique features and concerns. Subjecting these provisions to strict scrutiny risks drawing the permissible boundaries for these provisions so narrowly that this variety vanishes and the unique concerns that those provisions address would no longer be met. Quite necessarily, States are the laboratories where solutions to difficult legal problems must evolve. *See Oregon v. Ice*, 129 S. Ct. 711, 718-19 (2009). The spectrum of solutions the States have devised for addressing the conflict

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[14] *See also* Alaska Uniform Rule 34(b); Ind. H.R. Rule 47; Ind. S. Rule 4(b); Kan. H.R. Rule 2508(b); Kan. S. Rule 19; Me. S. Rule 401(3); N.Y. S. Rule IX(1)(b) (2009); N.D. H. Rule 321; N.D. S. Rule 321; Ohio Legis. Code of Ethics § 4; S.C. Code Ann. § 8-13-700(B); S.D. J. Rule 12-1; W. Va. Code § 6B-2-5(i); Wis. Assemb. Rule 77 (2009); Wis. S. Rule 73(1) (2009).

[15] *See also* 5 Ill. Comp. Stat. 420/3-202; Iowa S. Rule 23; Mich. H.R. Rule 31(2) (2009); Neb. Rev. Stat. § 49-1499; N.Y. Assemb. Rule V, § 2(a) (2009).

[16] Ark. Code Ann. § 21-8-803; Idaho Code Ann. § 59-704; Minn. Stat. § 10A.07; Mont. Code Ann. § 2-2-112(2); Or. Rev. Stat. § 244.120(1); Tenn. S. Rule 13 (2009); Utah Code Ann. § 76-8-109(2).

problem furthers the need for this Court's review in this case. This Court should ensure that the States have the flexibility to continue to perfect the proper balance between the two public interests of having fully-participatory representatives and prohibiting the influence of selfish motivations on the part of those representatives.

C. Given the depth and breadth of conflict of interest provisions and their importance to the States, it is imperative that the Court end the confusion as to the proper test and establish that strict scrutiny is not required.

Recusal of state officials is a matter especially suited for state governance. States' laws, as warranted and permitted by their constitutions, control the power of their officials to act. States are in the best position to account for their own traditions and histories in determining the appropriate course for public officials faced with conflicts of interest. It is the States that must deal with the consequences of unscrupulous officers. And the States must be able to respond when new ethical issues arise, without strict scrutiny and its attendant presumption of unconstitutionality threatening the validity of every enforcement action. *See* Pet. 11. As the provisions listed in the previous section show, a plethora of methods for dealing with conflict exists, reflecting the variety of concerns and interests the States must balance in enacting these provisions.

For instance, term limits for legislators in a State may affect its determination of how best to deal with conflicts of interest. *See, e.g.*, Me. Rev. Stat. tit. 1, § 1011 ("Membership in the Legislature is not a full-time occupation and is not compensated on that basis; moreover, it is measured in 2-year terms, requiring each member to recognize and contemplate that his election will not provide him with any career tenure."). Fifteen States impose term limits,[17] creating different concerns in the regulation of their legislators. In a term-limited State, the realities of officials' fixed time in office must be considered and balanced with the integrity concern motivating these conflict of interest provisions.

Another factor contributing to the diversity of conflict laws among the States is the variation in population sizes and related size of the pool of potential public officials. An effective conflict law for Florida legislators may not be workable for town board members in a tiny hamlet in Vermont. *See* Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. Sch. L. Rev. 177, 180 (1995) ("An ethics provision that is good for a state or a major city may devastate a small municipality."). Such differences explain why, in some communities, "a 'two-hats' provision prohibiting a public official from holding a political office is unworkable (there are simply not enough volunteers to go around), [and] why broad 'revolving door' restrictions will probably keep some of the best people out of local

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[17] *See The Term Limited States*, Nat'l Conference of State Legs. (June 2009), http://www.ncsl.org/default.aspx?tabid=14844 (last visited Nov. 8, 2010).

government." *Id.* at 181 (footnote omitted). States and localities are keenly aware of those issues. Therefore, it is critical that they retain the necessary flexibility in the enactment and administration of conflict provisions to ensure the interests of the respective communities are met.

Official voting is rife with potential ethical problems, and States must have the latitude to address that potential consistent with their own concerns. While the details vary, the existence of conflict provisions in every State ultimately makes this Court's review necessary. The States have collectively identified public officials' conflicts of interest as a matter of critical importance, and the uncertainty created by the court split interferes with their sovereign ability to address these critical issues.

Moreover, strict scrutiny impedes the States' abilities to regulate their own officials and ensure that the appropriate fit is enacted. As in elections, States must "play an active role" in the regulation of their officials. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (noting the unfavorable, heavy burden strict scrutiny would impose on state election regulations). Contending with strict scrutiny would make ethics laws burdensome to draft and administer, and the prospect of its application "opens the door to much litigation and little good." *Carrigan*, 236 P.3d at 632 (Pickering, J., dissenting). Given the on-going evolution of these provisions and the many variations in their details, a State would have a difficult time convincing a court that its choice is the "least restrictive means" of all. *Ashcroft v. ACLU*,

542 U.S. 656, 666 (2004). The precision required to justify each line drawn would make the provisions too narrow to serve the compelling purposes for which they were enacted. To subject every voting conflict of interest provision to strict scrutiny "would tie the hands of States" in promoting integrity in governance. *Burdick*, 504 U.S. at 433.

Instead, state ethics laws should be permitted to develop and evolve as necessary to serve their intended purposes and the people of the States. The test applied to these provisions should balance the asserted constitutional injury against the state interests, and accord States and localities the broad latitude necessary to carry out the purposes of these measures. *See* Pet. 22 (quoting *Burdick*, 504 U.S. at 434). However officials' voting is characterized, the regulation of it should not be subject to strict scrutiny. *See* Pet. 19. Therefore, this Court should review the decision below to ensure that the specter of strict scrutiny does not interfere with the myriad methods States have conceived to protect the integrity of their governments.

CONCLUSION

For all of the above reasons, this Court should review the decision of the Nevada Supreme Court.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

No. 10-568

In the Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 27, 2010
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Opinion of the First Judicial District Court of the State of Nevada in and for Carson City, May 28, 2008 ..... 40a

Opinion of the Supreme Court of the State of Nevada, July 29, 2011 ..... 1a

FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

No. 07-OC 01245 1B

MICHAEL A. CARRIGAN,

Plaintiff,

v.

NEVADA COMMISSION ON ETHICS

Defendant.

RELEVANT DOCKET ENTRIES

No.	Filed	Action
--	9/5/07	Verified Petition for Writ of Mandamus & Prelim. and Permanent Injunctive Relief
--	9/05/07	Verified Motion for Temporary Restraining Order
--	9/07/07	Answer to Notice of Petition/Writ/ Mandamus and Preliminary and Permanent Injunctive Relief

No.	Filed	Action
--	9/20/07	Order
54	10/09/07	Petition for Judicial Review
53	10/09/07	Motion for Stay of Enforcement of Final Decision
50	11/29/07	Administrative Record on Appeal Certification of Official Records of Nevada State Commission on Ethics Volumes I
49	11/29/07	Administrative Record on Appeal Certification of Official Records of Nevada State Commission on Ethics Volumes II
47	11/29/07	Record of the Proceeding Under Review

No.	Filed	Action
45	12/07/07	Order Denying Motion for Stay of Enforcement of Final Decision
42	12/07/07	Reply to Respondent's Opposition to Motion for Stay of Enforcement of Final Decision
41	12/11/07	Notice of Entry of Order
40	1/07/08	Petitioner's Opening Brief in Petition for Judicial Review
36	2/25/08	Respondent's Answering Brief
33	2/25/08	Amicus Curiae Brief of Legis-lature of the State of Nevada
32	2/28/08	Petitioner's Corrected Opening Brief in Petition for Judicial Review

No.	Filed	Action
24	3/20/08	Order Granting the Motion of the Nevada Legislature for leave to File Amicus Curiae Brief and for Permission to Participate as Amicus Curiae in Any Oral Argument or Hearing
21	3/26/08	Petitioner's Reply Brief
20	3/26/08	Request for Hearing
19	3/27/08	Order
15	5/27/08	Transcript of Proceedings – Petition for Judicial Review 5/12/08

No.	Filed	Action
14	5/28/08	Order of Judgment Denying Petitioner's Petition for Judicial Review and Affirming the Final Decision of the Nevada Commission on Ethics
12	5/30/08	Notice of Entry of Order
11	6/20/08	Order Denying Pe[t]ition for Writ of Mandamus Prohibition
10	6/24/08	Notice of Appeal
9	6/24/08	Case Appeal Statement
6	7/23/08	Order Setting Expedited Briefing Schedule
3	8/25/10	Opinion

SUPREME COURT OF NEVADA

No. 51920

MICHAEL A. CARRIGAN, FOURTH WARD CITY COUNCIL MEMBER, OF THE CITY OF SPARKS

Petitioner,

v.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent.

RELEVANT DOCKET ENTRIES

Date	Docket Entry
6/25/2008	Filed Certified Copy of Notice of Appeal/No Settlement. Notice of exemption from settlement conference program mailed to all counsel. (Docketing statement mailed to counsel for appellant.)
6/30/2008	Filed Motion. Motion for Expedited Appeal
6/30/2008	Filed Docketing Statement

Date	Docket Entry
7/16/2008	Filed Transcript. Proceedings: 08/29/07. Court Reporter: Eric Nelson
7/22/2008	Filed Order. We conclude that an expedited briefing schedule is appropriate, and therefore, we grant appellant's motion. Appellant shall have 30 days from the date of this order to file and serve the opening brief and appendix. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1). Upon the completion of briefing, we will expedite our resolution of this appeal as the court's docket permits.
7/24/2008	Filed Opening Brief
7/24/2008	Filed Joint Appendix. Vols. 1-4
8/25/2008	Filed Answering Brief.
8/25/2008	Filed Amicus Brief. Amicus Curiae Brief of the Legislature of the State of Nevada in Support of the Commission on Ethics of the State of Nevada
9/24/2008	Filed Reply Brief

Date	Docket Entry
9/24/2008	Filed Joint Appendix. Supplement to Joint Appendix
10/28/2008	Filed Order. Disclosure of non-disqualifying interest. I see no reason to recuse myself from consideration of this appeal. Ron Parraguirre
2/02/2009	Issued Notice Scheduling Oral Argument. Oral Argument is scheduled for 30 mintues in Carson City on March 3, 2009 at 10:30 a.m. (En Banc)
3/03/2009	Submitted for Decision
3/10/2009	Disqualification of Justice Parraguirre
7/29/2009	Filed Per Curiam Opinion. "Reversed." Before the Court EN BANC. Fn1 [The Honorable Ron Parraguirre, Chief Justice, voluntarily recused himself from participation in the decision of this matter.] Author: Douglas, Michael L. Majority: Douglas/Hardesty/Cherry/ Saitta/Gibbons. Dissent: Pickering. 126 Nev. Adv. Opn No.28. EN BANC

Date	Docket Entry
12/27/2010	Filed Order Granting Motion to Stay Reissuance of Remittitur until final disposition has been rendered by the Supreme Court of the United States

The City of Sparks

MAYOR
Geno Martini

CITY COUNCIL
John R. Mayer, Ward I
Phillip Salerno, Ward II
Judy Moss, Ward III
Mike Carrigan, Ward IV
Ron Schmitt, Ward V

SPECIAL CITY COUNCIL MEETING AGENDA
6:00 P.M., Wednesday, August 23, 2006
City Council Chambers
Legislative Building, 745 Fourth Street, Sparks, Nevada

Order of Agenda - Items listed on the agenda may be taken out of order.

Accommodations - The Sparks City Council Chambers are accessible to individuals with disabilities. Reasonable efforts will be made to accommodate persons with special needs such as sign language interpreters. Please call the City Clerk (775) 353-2350 one week in advance of the meeting. TDD Line 353-2350.

Rules - Addressing the Council - The meetings conducted by the Sparks City Council in the City of Sparks Legislative Building are not public forums. The presiding officer will enforce viewpoint neutral procedural rules to ensure orderly conduct during

that portion of the Agenda set aside for Public Comment. In order to allow the City Clerk to properly document those individuals speaking to the City Council, persons desiring to address the Council shall first provide the City Clerk with a written request to speak so they may be recognized by the presiding officer.

Manner of Addressing the Council - In order to conduct orderly, efficient, effective and dignified meetings that promote a governmental purpose with a governmental process, public comment may address any agenda item or other public issue that the City Council has the authority to effectuate or exercise control over. Public comment on matters beyond the City Council's scope of authority is not relevant to Council business, does not invoke a governmental process nor serve a governmental purpose and is contrary to the effective, efficient and orderly business conducted by the Sparks City Council. Each person addressing the Council shall step up to the microphone, shall give his/her name and shall limit the time of his/her presentation to three (3) minutes. All public comment remarks shall be addressed to the Council as a body, and not to any member thereof. No person, other than members of the Council and the person having the floor shall be permitted to enter into any discussion, either directly or through the members of the Council. No questions shall be asked of the Council members, except through the presiding officer. Speakers shall avoid undue repetition of points previously presented to the Council.

Sound Amplification - The City of Sparks provides sound amplification during its public

meetings for the convenience of the speakers and the audience. Sound amplification, if enhanced by yelling or shouting can cause hearing and equipment damage. Public speakers using the sound amplification shall not disrupt the meeting by yelling or shouting into the microphone while addressing the City Council.

Disruptive Conduct - Any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical may be removed from the meeting by order of the presiding officer. A person willfully disrupts a meeting when he/she (1) uses physical violence, threatens the use of physical violence or provides the use of physical violence or (2) continues to use loud, boisterous, unruly or provocative behavior after being asked to stop, which behavior is determined by the presiding officer, or a majority of the Council present, to be disruptive to the orderly conduct of the meeting or (3) fails to comply with any lawful decision or order of the presiding officer or of a majority of the Council relating to the orderly conduct of the meeting.

Action Items - Range of Possible Actions - Those items NOT marked with an asterisk (*) are items on which the Council may take action, which means that the Council may take any action, including, but not limited to, any one or combination of the following: (1) determine whether a business impact statement is required under NRS 237.080; (2) adopt, enact or approve the item as presented or recommended; (3) amend or make changes (substantial or minor) to the item as presented and then approve it as amended or changed; (4) approve

the item with substantial or minor conditions; 15) deny, reject or fail or refuse to adopt, enact or approve the item, with or without prejudice; (6) table or postpone consideration of the item; (7) refer the item to staff or another public body for more information, advice or decision; (8) make a decision on the item; 9) make a commitment or promise regarding the item; (10) take a vote on the item; (11) do nothing at all.

Business Impact Statement - A business impact statement is available at the City Clerk's office for those items marked with a "S."

Posting - I. Deborine J. Dolan, City Clerk of the *City* of Sparks, Nevada, do hereby certify that this agenda was posted at the following locations three or more working days before the meeting:

Sparks City Hall,
431 Prater Way

Sparks Legislative
Building, 745 4th Street

Sparks Police
Department, 1701 E.
Prater Way

Sparks Recreation
Center
98 Richards Way

Alf Sorensen Community
Center, 1400 Baring
Boulevard

Sparks Justice Court,
630 Greenbrae Drive

Sparks Branch Library
1125 12th Street

Special City Council Meeting Agenda
Wednesday, August 23, 2006

1. *Call to Order
2. *Roll Call

*Comments from the Public

3. P.H. PCN05073, Red Hawk Land Company, tentative approval of an amendment to a Planned Development Handbook (Tierra del Sol) to allow for a resort offering entertainment, dining, non restricted gaming, commercial, a 200 room hotel and a public facility, for a site approximately 57 acres in size in the PD (Planned Development — Tierra del Sol) zoning district generally located east of Pyramid Highway and north of Lazy 5 Regional Park
4. Comments from the Council and City Manager
5. *Adjournment * * * *

Agenda Item: Tentative Approval of Planned Development Handbook
Meeting Date August 23, 2006

City of Sparks
City Council Item

Meeting Date: August 23, 2006

Subject: P.H., PCN05073, Red Hawk Land Company, for a site approximately 57 acres in size in the PD (Planned Development – Tierra del Sol) zoning district generally located east of Pyramid Highway and north of Lazy 5 Regional Park.

A. Tentative Approval of an amendment to a Planned Development Handbook (Tierra del Sol) to allow for a resort offering entertainment, dining, non restricted gaming, commercial, a 200 room hotel, and a public facility.

Petitioner: Red Hawk Land Company

Recommendation: The Planning Commission and Community Development Department recommends denial of PCN05073; see suggested motion below.

Financial impact: N/A

Business impact (per NRS Chapter 237):

☐ A Business Impact Statement is attached

☒ A Business Impact Statement is not required because:

☒ This is not a rule:
(Term excludes vehicles by which legislative powers are exercised under NRS Chapters 271, 278, 278A, and 278B.)

Agenda Item Brief:

The Tierra del Sol Planned Unit Development Handbook was adopted on August 7, 2000. This planned development consists of 56.7 acres. Tierra del Sol is located along the Pyramid Highway, which is major arterial for the Spanish Springs Valley. The surrounding land uses are a mix of future commercial, regional park and single family homes.

This request is to amend the existing Tierra del Sol Planned Development Handbook. The proposed amendment includes updating the handbook to incorporate the existing development within Tierra del Sol planned development along with corrected acreages, changing the phasing, administrative corrections, revising the commercial section, and including new designations of Resort and Public Facility. The Resort designation would allow for a resort hotel and other uses associated with this type of use including non-restricted gaming, which is limited to a maximum area of 18,000 square feet. The Public Facility designation would allow for the

construction of a public services facility to benefit city residents. The site will have limited access from Pyramid Lake Highway and will also be accessible from both Tierra del Sol Parkway and Dolores Drive.

On July 17, 2006 the Planning Commission denied the requested amendment. Staff originally recommended approval of the proposal. However, the Planning Commission found that the project is not in the public interest as it relates to PD Findings 18 & 21. The project, as submitted and conditioned, is not consistent with the City of Sparks Master Plan as the graphic depictions of land use designations in the City of Sparks prevail over the text of the NSSOI Plan, and that graphic designations associated with the General Commercial land use designations do not permit resort hotels with gaming. Additionally, the proposed modification of the Tierra del Sol Planned Development does not further the interests of the City because the Master Plan serves as the ultimate policy and guidance for land use development within the City.

Background / Analysis / Alternatives

For more details refer to page 4 of the Planning Commission Staff Report attached to this Report.

ALTERNATIVES:

1. The City Council can approve the application(s).
2. The City Council can remand the application(s)

back to the Planning Commission with direction.

SUGGESTED MOTION:

Tentative Planned Development Handbook:

I move to deny the tentative planned development handbook for Tierra del Sol (PCN05073). The project is not in the public interest as it relates to PD Findings 18 & 21. The project, as submitted and conditioned, is not consistent with the City of Sparks Master Plan as the graphic depictions of land use designations in the City of Sparks prevail over the text of the NSSOI Plan, and that graphic designations associated with the General Commercial land use designation do not permit resort hotels with gaming. Additionally, the proposed modification of the Tierra del Sol Planned Development does not further the interests of the City because the Master Plan serves as the ultimate policy and guidance for land use development within the City.

ALTERNATIVE MOTION:

Tentative Planned Development Handbook:

I move for tentative approval of PCN05073 to tentatively approve the amendment to the Tierra del Sol Planned Development Handbook. This recommendation adopts Findings PD1 through PD21 and the facts supporting these Findings as set forth in the Planning Commission staff report. The tentative approval includes the requirement that the applicant shall file the application for the final approval for the first phase of the planned development within one (1) year from the date of the City Council granting tentative approval of the planned development handbook. The tentative approval requires

that the Wingfield Springs Planned Development Handbook be amended to remove the resort complex and a development agreement to supplement the 1994 Wingfield Springs Development Agreement be approved by the city that must include the modification to the Wingfield Springs Handbook, provide socially beneficial contributions and details regarding the transfer of the gaming component to Tierra del Sol. These requirements are a prerequisite to Final Approval. Due to the nature of the tentative planned development, the Planning Commission does not recommend that the City Council require a bond at this point in time as stated in NRS 278A.490.

Respectfully submitted: Approved:

Neil C. Krutz, P.E.
Community Development Director

Shaun D. Carey, P.E.
City Manager

Prepared by:

Karen L. Melby, AICP
Manager of Current Planning

Tim Thompson, AICP
Senior Planner

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Minutes of the Special Meeting of the Sparks City Council for August 23, 2006

3. P.H. on PCN05073, Red Hawk Land Company, Amendment to the Tierra del Sol Handbook, Tentative Approval, to Allow for a Resort/Hotel/Gaming Development

Time: 6:06:55 p.m.

An agenda item from Senior Planner Tim Thompson recommending the City Council conduct a public hearing and deny a request from the Red Hawk Land Company for tentative approval of an amendment to a Planned Development Handbook (Tierra del Sol) to allow for a resort offering entertainment, dining, non-restricted gaming, commercial, a 200 room hotel, and a public facility on a site approximately 57 acres in size in the PD zoning district generally located east of Pyramid Highway and north of Lazy 5 Regional Park.

Council Member Carrigan disclosed that Mr. Carlos Vasquez, a consultant for Red Hawk Land Company, is a personal friend and also his campaign manager. He also disclosed that as a public official he does not stand to reap financial or personal gain or loss as a result of any official action he may take tonight; therefore, according to NRS 281.501, he believed that this disclosure of information is sufficient and that he would be participating in the discussion and vote on this issue.

Mayor Martini disclosed that, although he did not have a vote in this matter, Mr. Vasquez was also a friend of his and his campaign manager and that he

did not stand to gain anything from this project, should it be approved.

Mr. Thompson noted that this proposed amendment includes updating the handbook to incorporate the existing development within the Tierra del Sol Planned Development, along with corrected acreages; changing the phasing; administrative corrections; revising the commercial section; and including new designation of resort and public facility. He said that the resort designation would allow for a resort/hotel and other uses associated with this type of use, including non-restricted gaming, which is limited to a maximum area of 18,000 square feet. He said the public facility designation would allow for the construction of a 4,800 square foot public services facility on the site.

Mr. Thompson displayed a map which showed where the project would be located in relationship to the Pyramid Highway and the surrounding adjacent land uses, which is retail, commercial, and business park.

Mr. Thompson said this is a unique situation; to staff's knowledge the City of Sparks has never embarked on anything quite like this before. He then gave a history of the project, stating that in 1994, the City Council adopted a development agreement with Loeb Enterprises to develop Wingfield Springs. Part of that agreement was an agreement between the City and the developer which included extending infrastructure into the Spanish Springs Valley, including a road network, sewer, and other utilities. Also in that development agreement was a provision that any portion of that entitlement could be moved

to another location within the City of Sparks. He said there has been a lot of discussion about the intent [of the agreement] in 1994. He said that as City staff they have looked at the agreement; however, many of the current staff were not employed by the City in 1994 and therefore they cannot speak to what the intent of the agreement was; they simply focused on the plain language of the agreement. He said essentially staff believes the plain language of the agreement is a transfer of development rights.

Mr. Thompson noted that before the meeting he passed out a copy of an e-mail from Senior City Attorney David Creekman which basically defines what a transfer of development right is. He said essentially the entitlement is attached to a certain property or a certain plan and that entitlement is detached from that plan and attached to another location. He said this is what the applicant is asking to do: essentially transfer his entitlement to build a resort in Wingfield Springs to Tierra del Sol. Mr. Thompson said the definition, as Mr. Creekman points out, is somewhat esoteric; however, he felt it did a very good job of explaining exactly what a transfer of development right is.

Mr. Thompson said the 1994 development agreement also locked in place the plans that were in effect at the time the development agreement was adopted; mainly the Tourist Commercial land use designation and the locational criteria associated with that. He said in 1991 the City adopted the NSSOI Plan; that plan, in essence, set forth a vision for Sparks' development into the Spanish Springs Valley and that plan included and always

contemplated a single node of Tourist Commercial use, up to 37 acres. He said the maps associated with the plan at that time, some believe, were conceptual and an argument could be made that the maps at that time show that this use would be located in proximity to Wingfield Springs.

Mr. Thompson said the locational criteria of the Tourist Commercial land use designation, at that time, essentially stated that tourist commercial activities, including hotels, casinos and nonrestricted gaming uses were appropriate along major arterials: that includes Pyramid Highway and Vista Boulevard, which is why it was originally approved within the Wingfield development.

Mr. Thompson stated there has been a lot of discussion about traffic in Spanish Springs and this project will actually reduce the amount of traffic. He said this site is already approved for 200,000 square feet of retail commercial uses and those uses generate average daily trips (ADT) in the neighborhood of 8,800 trips. This proposed project actually reduces the estimated amount of traffic down to 7,900 average daily trips. He emphasized that the traffic, with or without this project, is going to be there.

Mr. Thompson said that the NSSOI plan, coupled with the County's plan for Spanish Springs, estimates that there will be in excess of 50,000 residents in the Spanish Springs valley and we are close to being half way to that figure. He said that one of the things that the City has done in recent years was realize that people who live in Spanish Springs need a place to shop in Spanish Springs and

they need a place to work in Spanish Springs and staff worked very hard in the 2002 Regional Plan Update to get this area designated as an emergency employment center. He said that a jobs/housing balance is very critical because at 10 ADT per household and 50,000 residents, there will eventually be 250,000 ADT in and out of the valley: people having to go to work and shop outside the valley. He said Vista Boulevard, Sparks Boulevard, Pyramid Highway and Highland Ranch are the only four access points to the south from the Spanish Springs Valley and it is critical that we provide a place for residents in Spanish Springs to shop and work in the valley to help reduce traffic coming to and from the Truckee Meadows.

Mr. Thompson said that this project, in the proposed location, provides a natural buffer, being surrounded on all sides by roadways. He said the applicant has the entitlement to build this project in Wingfield Springs; however the current location of the resort complex in Wingfield Springs has homes constructed on it. But this does not mean that the entitlement is void and a simple handbook amendment to move that use somewhere else within the Wingfield Springs Development could allow this project to be built adjacent to our new Golden Eagle Regional Park facility. The developer is asking to move that entitlement to Tierra del Sol and staff believes that this is an appropriate location for this type of use because putting it along the Pyramid Highway allows for better access for everyone. It also keeps it out of the neighborhoods.

Mr. Thompson said the applicant is also proposing to use a statute from state law that deals

with density bonuses. Essentially the statute says that in exercising the powers granted in this section (278.250) the governing body may use any controls related to land use or principles of zoning that the governing body determines to be appropriate, including, without limitation, density bonuses, inclusionary zoning, and minimum density zoning. He noted that the next paragraph goes on to say that density bonus means an incentive granted by a governing body to a developer of real property that authorizes the developer to build at a greater density than would other wise be allowed under the Master Plan in exchange for an agreement by the developer to perform certain functions that the governing body determines to be socially desirable, including, without limitation, developing an area to include a certain proportion of affordable housing. He said that the developer is proposing to construct, at no cost to the City, a 4,800 square foot community services building, as well as donate $300,000 to the City for Affordable Housing purposes. Mr. Thompson emphasized that the City has not determined how the facility would be used, nor have we determined that the best way to use the donation for affordable housing.

Mr. Thompson said this provision clearly states that the developer could build at a greater density that what would be allowed in the Master Plan; hence a reason why staff has not required a Master Plan amendment in this case.

He said that in the past, as with The Foothills at Wingfield subdivision, when it was developed, it was developed under the NSSOI plan, which set forth land uses and maximum density for the area. When the developer came in, the City said they could change the land uses around, as long as they stayed within the plan area and as long as they didn't increase the density or change the intensity of the plan, the City would not require a Master Plan amendment. Mr. Thompson said the developer came in and moved the land uses around, refined those uses, and created a handbook and that is what you see out at The Foothills at Wingfield Springs today.

Mr. Thompson said the City has also allowed the applicant, several times, to amend the Wingfield Springs handbook to move uses around without requiring a Master Plan amendment as the intensity hasn't changed (increased). He said the applicant is arguing that within the NSSOI plan, it accounted for up to 37 acres of a single node of Tourist Commercial activity and they believe a Master Plan amendment is not required because it doesn't change the integrity of the NSSOI plan; it simply moves the use to, what staff believes, is a more appropriate location.

Mr. Thompson said that at the Planning Commission meeting there was a motion to remove the gaming component from this facility and approve, as such. In staffs opinion this would have changed the intensity and integrity of the plan and increased traffic. He said staff believes that if the gaming component were removed, based on Tourist Commercial land use, that the hotel component would also have to be removed, which would further

change the integrity of the plan being proposed by the applicant. He said that 278A states that a project can be approved, it can be denied, or it can be approved with conditions; however, by removing those uses, none of the three were being met.

He said that at the second meeting staff advised the Planning Commission that if they did not believe that gaming was an appropriate use, then they must remove the hotel component from this project as well; and the Planning Commission should recommend denial of this project based on PD findings 18 and 21, which essentially state that the project is not in conformance with the Master Plan, nor is it in the public interest.

Mr. Thompson said that staff made a recommendation to the Planning Commission for approval; however, in front of the City Council staff represents the Planning Commission and therefore they are recommending denial of this project based on PD findings 1 through 21 as listed in the Planning Commission staff report, He noted that findings 18 and 21 support denial and should the City Council uphold the Planning Commission's decision, staff is asking that they base their denial on PD findings 18 and 21. Mr. Thompson said that should the Council choose to overturn the Planning Commission's recommendation, staff suggests the Council use the PD findings listed in the Planning Commission staff report that support approval of this project.

The Planned Development Findings for PCN05073 are listed as follows:

PD1 The plan is consistent with the objective of furthering the public health, safety, morals and general welfare by providing for housing of all types and design.

This is a mixed use project incorporating residential, tourist commercial (entertainment) and general commercial components. The Tierra del Sol development has been developed to date with single family homes at the density at 4 dwelling units per acre which fits into the entire Northern Sparks Sphere of influence area as a component piece to offer housing of all types and design. The applicant will make a financial contribution towards affordable housing.

PD2 The plan is consistent with the objective of furthering the public health, safety, morals and general welfare by providing for necessary commercial and industrial facilities conveniently located to the housing.

This project consists of existing housing and proposed commercial and entertainment uses. The entertainment area within Tierra del Sol will provide dining and entertainment options plus a proposed movie theater and arcade in close proximity to many existing and proposed homes in the Spanish Springs Valley. It should be noted that both the Wingfield Springs Planned Development handbook and the Wingfield Springs Development

Agreement limits the amount of resort related commercial/casino uses to 100,000 square feet. Of the 100,000 square feet only 18,000 square feet can be non restricted gaming of which a maximum of 50% can be slot machine type gaming. Any change exceeding the square footage shall be required to be processed as an amendment to the Development Agreement, requiring public hearings and approval by the Regional Planning Commission and the Sparks City Council. Currently, the applicant proposes approximately 315,000 square feet of total area for the Resort site. Therefore, the non restricted gaming component will be approximately 5.7% of the total overall square footage proposed for the site. The applicant will also provide a community center and contributions to affordable housing.

PD3 The plan is consistent with the objective of furthering the public health, safety, morals and general welfare by providing for the more efficient use of land and public or private services.

The plan is designed to provide entertainment and some commercial resources for the surrounding residences in the Spanish Springs Valley which will reduce trips into the Truckee Meadows area.

PD4 The plan is consistent with the objective of furthering the public health, safety, morals and general welfare by providing for changes in technology of land development so that resulting economies may be available to those in need of homes.

The proposed Planned Development allows flexibility in development. There are existing homes at 4 du/acre, commercial and entertainment uses proposed as part of this PD. The size of the planned development restricts the ability to provide a wider range of housing types.

PD5 The plan is consistent with the objective of furthering the public health, safety, morals and general welfare by providing for flexibility of substantive regulations over land development so that proposals for land development are disposed of without undue delay.

The proposed amendment is to provide commercial and entertainment which is not provided elsewhere in the Spanish Springs Valley. This amendment will not hinder the development of surrounding lands.

PD6 The plan does not depart from zoning and subdivision regulations otherwise applicable to the property and these departures are in the public interest for density.

The amendment provides standards that exceed the zoning standards for development with additional landscape requirements, perimeter landscaping, and architectural standards for the buildings.

PD7 The plan does not depart from zoning and subdivision regulations otherwise applicable to the property and these departures are in the public interest for bulk.

Due to the property location, adjacent to Pyramid Highway, the site is best suited for high intensity development along the transportation corridor with stepped density to match proposed densities and facilities to the east and south.

PD8 The plan does not depart from zoning and subdivision regulations otherwise applicable to the property and these departures are in the public interest for use.

Due to the location of the property, along Pyramid Highway, the mix of uses from higher intensity commercial and medium density residential uses is appropriate. This project will provide entertainment facilities and some commercial resources in the Spanish Springs Valley that would otherwise be unavailable to the residents of the Valley. This will also help to reduce vehicle miles traveled.

PD9 The ratio of residential to nonresidential use in the planned development is:

Based on acreage the ratio is: Residential — 51.8% to Nonresidential — 48.2%.

PDI0 Common open space in the planned development exists for what purpose,

is located where within the project, and comprises how many acres (or what percentage of the development site taken as a whole).

The open space is located in the existing residential portion of this planned development with pedestrian corridors and open space areas. Within the resort and commercial area the minimum landscape required is 20% which complies with open space requirements for planned developments.

PD11 The plan does provide for the maintenance and conservation of the common open space by what method.

The open space within the Tierra del Sol Planned Unit Development will be maintained by an association to assure consistent and positive maintenance. Two separate associations (one for the residential area and one for the resort and commercial area) will likely be used.

PD12 Given the plan's proposed density and type of residential development, the amount and/or purpose of the common open space is determined to be adequate.

The requirement for open space in a Planned Development is 20%. The residential portion of the Tierra del Sol Planned Development meets or exceeds the requirement for "common open space" such as trails, linear parks, etc. The residential portion provides 6.0± acres or ±22% in common open space. This open space is provided as trail linkages to the Regional Trail System located at the

southeastern corner of the property. This meets the requirements set forth by Code. The resort and commercial areas are required to provide at least 20% of the site in landscape area. S.M.C. 20.18.030(C) (4) states: "For non-residential development the common open space requirement can be met by providing a minimum of 20% of the development as landscaped area." The landscaping will include perimeter landscaping and landscaping within the commercial, resort and public facilities areas amounting to a minimum of 20%.

PD13 The plan does provide for public services. If the plan provides for public services, then these provisions are/are not adequate.

The Handbook discusses the public services to be provided which include the street network and public facilities. The applicant is also proposing to construct, at no cost to the city, a 4,800 square foot community services building which may be used as a police substation, citizen service center, or for other civic purposes.

PD14 The plan does provide control over vehicular traffic.

Primary traffic facilities for this project are the Pyramid Highway, Dolores Drive and Tierra del Sol Parkway. Dolores Drive is identified to be signalized and to be a 4 lane roadway to serve the commercial and resort parcels of the Tierra del Sol PD. These planned improvements will help provide appropriate traffic capacities and control of vehicular traffic with the development of the Tierra del Sol project.

PD15 The plan does provide for the furtherance of access to light, air, recreation and visual enjoyment.

The project has been setback from the Pyramid Highway corridor so as to provide better views across the Spanish Springs Valley, eastward from the Highway. The combined benefits from setbacks, architectural theme and landscaping help to meet the requirement of providing a furtherance of access to light, air, recreation and visual enjoyment.

PD16 The relationship of the proposed planned development to the neighborhood in which it is proposed to be established is beneficial.

The Tierra del Sol Planned Development provides a mix of uses with residential, commercial, public facility, and resort commercial uses. The commercial and resort commercial uses will benefit the residents in the Tierra del Sol community as well as those within the communities surrounding Tierra del Sol by providing convenient services and retail establishments. Also, the resort component will provide a benefit to those surrounding the Planned Development area with the entertainment component (restaurants, arcades, movie theaters, spa, etc.). A relatively small gaming component is included and this will meet the needs and desires of those who choose to gamble within the Spanish Springs area.

PD17 To the extent the plan proposed development over a number of years, the terms and conditions intended to

protect the interests of the public, residents and owners of the planned development in the integrity of the plan are sufficient.

The standards and phasing in the Planned Development Handbook addresses the development to retain the integrity of the plan and defines the responsible parties.

PD18 The project, as submitted and conditioned, is inconsistent with the City of Sparks Master Plan.

The Northern Sparks Sphere of Influence Plan (NSSOI), which serves as the Sparks Master Plan for both Tierra del Sol and Wingfield Springs, states that the plan is intended to identify general land uses to guide future development in the planning area (NSSOI pg. 2.199). Further, the plan states that its intent is to provide a mix of uses with an emphasis on master plan developments. The NSSOI clearly contemplated a tourist commercial use since it shows up on Table 1 (37 acres of tourist commercial) and is included as a planned land use (NSSOI pg. 2.205

Running contrary to the above stated intent, however, are the City's graphic representations of land use designations in the City of Sparks as contained in the City's Master Plan map. These graphic representations ideally are consistent with the plan's text. In this case, the text and representations do not match one another. Because of this conflict, the project is inconsistent with the Master Plan when such plan is viewed as a whole.

PD19 The project is consistent with the surrounding existing land uses.

The only existing land uses, adjacent to the Tierra del Sol Planned Development are residential to the west (across Pyramid Highway, a State Highway) and Lazy 5 Regional Park to the south. The proposed development pattern of the Tierra del Sol Planned Development locates the residential adjacent to the Lazy 5 Park Site, at the southern end of the project as the residents of the community will be some of the many that will use the adjacent Regional Park facility. Commercial and resort uses are proposed adjacent to Pyramid Highway as an appropriate location from the standpoint of traffic separation with the residential area. Pyramid Highway (carrying nearly 40,000 vehicle trips per day) presents a larger impact on the area than the proposed commercial and resort uses will.

PD20 Public notice was given and a public hearing held per the requirements of the Sparks Municipal Code.

Public notice has been distributed. The Planning Commission and City Council meetings function as public hearings for the matter. The Nevada Revised Statutes and Sparks Municipal Code public hearing requirements have been met.

PD21 Modifications of the Tierra del Sol Planned Development do not further the interest for the city and the residents and do not preserve the integrity of the plan.

The Tierra del Sol Planned Development provides a mix of uses with residential, commercial, resort, and public facility uses. However, the City's interests are not served due to the conflicts between the Master Plan's land use designations and the project's proposed land uses.

Mayor Martini asked if the Council had any questions for Mr. Thompson. Council Member Carrigan asked the Acting City Attorney David Creekman for a legal opinion on the development agreement and if it was binding to future City Councils. Mr. Creekman said it was the opinion of the City Attorney's Office that the 1994 development agreement, which is specifically authorized by statute and was specifically authorized by statute in 1994 when it was entered into, constitutes a binding contract. He said it is also the opinion of the City Attorney's Office that the development agreement is clear, on its face, and does not require the City Council, or anyone else, to resort to what is called extrinsic evidence in order to interpret it. Mr. Creekman said that further, upon entering into the development agreement, as part of the Wingfield Springs entitlement, the City agreed to develop or establish for the part of the development agreement transferable development rights, which constitute a valuable property right. He said that going even further, there are general prohibitions in America against what is called contract zoning and these

prohibitions exist because they tend to impermissibly limit the discretion of subsequent City Councils. But the law is pretty clear across the nation that development agreements, when they are drafted and reserve some government control over the agreement, do not impermissibly contract away the discretion of subsequent City Councils, but rather constitute a valid present exercise of that power. He said that the discretion that the Council gets to continue to exercise is enumerated or spelled out in Section 7 of the development agreement, which permits the City and the other party to the development agreement to review that agreement on a regular bi-annual basis in order to update the terms and conditions, if either party is inclined to do so.

Council Member Carrigan said because all of us have been inundated with ads, TV spots and letters to the editor, his follow-up question was if this issue goes to court, where does "intent" fall into the issue. Mr. Creekman said intent is only at issue of the Court determines that the language of the development agreement is not clear and if they determine that it is not clear, then they need to go to, what is commonly referred to as, intrinsic (outside evidence) in order to ascertain what the intent of the parties was. He said that again, from the City Attorney's perspective, the language from the 1994 development agreement is clear. He said if this were a statute or city ordinance that we were interpreting, and assuming that it were unclear, the position or the statement of former legislators who had a role in enacting the statute, which he has successfully argued in the past, is irrelevant.

Council Member Carrigan asked for clarification that when staff brought this application before the Planning Commission their recommendation was for approval and the reason staff is now recommending denial is because the Planning Commission denied the application. Mr. Thompson confirmed that this was correct and Community Development Director Neil Krutz added that this is the process that staff is required to follow and staff is here tonight representing the Planning Commission and the decision they made.

Council Member Schmitt asked if there was anything different in the staff report tonight, from what was presented to the Planning Commission, other than the changes made to reflect the decision of the Planning Commission. Mr. Krutz said that both reports are the same, with the exception of the addition of the report of action from the two Planning Commission meetings.

Council Member Schmitt asked if staff had any legislative history of why the State of Nevada decided that density bonuses were important and what connection does it have to this project; or are we even concerned with density bonuses right now. Mr. Creekman said the foundational requirement in any zoning change is that the City Council believes that the proposed zoning is consistent with the Master Plan. There have been many arguments lodged about the believed inconsistency of this project with the City's Master Plan; however when you look at the statute which imposes that obligation on us, it provides an exception to the generally applicable rule that a zoning change be consistent with the Master Plan and that exception is found in

the density bonus chapter. He said it provides the legislative body, in this case the Sparks City Council, with the discretion to determine what might be a socially desirable project that the developer could contribute to the City in exchange for the strictest of compliance with the Master Plan. Mr. Creekman said the staff's original recommendation and belief is that the project is consistent with the Master Plan, but they have gone a step further and said that to the extent that there is a possible argument out there that there is an inconsistency with the Master Plan, let's exercise our prerogative under that statute to make use of the density bonus provisions so that we are certain that we have covered ourselves, in a legal sense, with respect to this action. He said the Planning Commission did not agree with this argument and for that reason staff is bringing forward the Planning Commissions recommendation tonight. Council Member Schmitt asked for clarification that the density bonus does not have to be part of this package and that the project conforms to the Master Plan. Mr. Creekman confirmed that it does not have to be, but the density bonus provision was included as an extra element of protection for what was originally brought forward by staff as a recommendation of approval.

Council Member Salerno asked how long an entitlement was valid. Mr. Krutz said that in this case it goes back to the development agreement and there was a term in the agreement that is out several years from where we are today, so we are still within the life of that agreement and the entitlement that was granted in 1994; however not all entitlements are like this. Mr. Thompson clarified

that the development agreement that was adopted in 1994 is valid until 2020 or 2021.

Mr. Carlos Vasquez, representing Red Hawk Land Development, the Peppermill, and Mr. Harvey Whittemore, introduced himself and explained that he would be speaking on some of the issues of why they want to move this project and some of the legal issues; Mr. David Snellgrove of Wood Rogers would be speaking about some of the planning and road use issues; Mr. Steve Mollath and Mr. Whittemore will then address the actual legal issues regarding moving the project and the development handbook; and then they would answer any questions the Council might have from the team.

Mr. Vasquez said one of the things he wanted to address, and something they have been asked a lot, is, "Why move it; you already have an entitlement in Wingfield, why not build it in Wingfield." He said the reason they are not building it in Wingfield is because it is a good business decision and it is also good planning: Wingfield is obviously a far more established neighborhood than where they are trying to go. He said back in 1994, Wingfield was out in the middle of nowhere... it was a different time and Sparks did not have the giant explosion it is having today and the City was trying to spur development and back then this was a risky project. However, today things have changed and the decision to move it to Tierra del Sol is based, primarily, on that change. He indicated a graphic on display and noted that the blue was Tierra del Sol and the yellow was approved commercial along the Pyramid Highway, which arguably has a much greater capacity for traffic than Vista Boulevard does, as it is currently

configured. He discussed the potential square footage of commercial uses currently approved along the Pyramid corridor and noted that the actual square footage of the proposed gaming floor (18,000) was less than 3/10ths of 1 percent of the total commercial use area approved to be built today.

Mr. Vasquez then provided a breakdown of the proposed uses of the Tierra del Sol project and noted that only 6% of the project is gaming floor. He emphasized that this project has been designed as an entertainment complex and they feel that this mix brings needed services to that area.

Mr. Vasquez then address a letter that the opposition has circulated to the community related to 12 issues that they felt were negatives to this project. He said in an effort to cut down the time of their presentation, they chose four of these issues to address because they are outside of the germaine planning and legal issues. He said that the first issue is that thousands of concerned citizens have signed a petition against the project, as well as the community Ad-Hoc Board. Mr. Vasquez said it was reported that 4,800 people signed this petition and they have been told that 1,100 of them are Sparks' residents and the rest are County residents. He said based on the current population of Sparks of 87,500 people, this is just under 1% of the actual population of the City.

The second issue he addressed was that the proximity of a casino to residential property decreases the value of the property. He said the reality is that this is unsubstantiated and there has been study after study on this issue and no one has

been able to prove this. He said that generally when there is commercial development, the property values dips slightly in the short term and then it goes back to a natural growth pattern which matches all the surrounding areas.

The third issue was that casinos on the Pyramid Highway will take away from the millions of dollars that have been invested to attract people to the downtown corridor. Mr. Vasquez said that with the original approval of the tourist commercial use in the NSSOI, the Regional Planning Commission made a finding that the proposed resort/casino would not threaten downtown Reno or Sparks casino interests. Additionally, the Regional Planning Commission said that a ceiling as to the size of a non-downtown casino at 20,000 square feet, further defining this as a limited resort gaming. He said the reason they did this was to protect existing gaming.

He said another issue he wanted to address, briefly, is the issue of casinos belonging in downtown and why didn't they put the casino in Victorian Square. Mr. Vasquez said this Council has already approved Phase I and Phase II of the Victorian Square Redevelopment Plan and with the other parcels of land owned by other gaming interests, there is no way that a gaming project will fit in the downtown area.

Mr. Vasquez said the final issue was that traffic issues including drunk driving and congestion, will increase if this project is allowed to move forward. He said the Peppermill, who will be operator of this property, and all formal casino projects, have policies in place to help regulate and control the

gaming/bar/restaurant environment, including the consumption of alcohol. He said that surveillance of parking lot areas and property grounds will be performed by private security patrols 24 hours a day, 7 days a week. Gaming properties have on-site security and they also have an enormous amount of over site from gaming control and therefore they don't have the ability, like a neighborhood bar would, to allow people to come and go as freely as they would in a non-regulated environment. He described the current security parameters at the Peppermill casino and emphasized that they have learned what works with their other casino and they plan to incorporate those factors into the security for the Lazy 8.

Mr. Vasquez said the Lazy 8 obviously will have an enormous amount of fiscal impact on the City of Sparks and he then discussed the expected revenues versus the cost to the City to provide services to this facility.

Mr. Vasquez then provided a verbal history of this development by reviewing a timeline (and backup materials) which they had provided to the Council.

Mr. Dave Snellgrove with Wood Rogers Consultants, reviewed the traffic issues, noting that a lot of the local casinos are on State Routes and the reason for this is because the heaviest carrying capacity is on these roads. He pointed out that locating the Tierra del Sol project on the Pyramid Highway makes better locational sense than putting it out on Vista Boulevard. He also discussed the projected average daily trips this project will

generate versus the carrying capacity of the Pyramid Highway and the locational criteria for access to the project.

Mr. Vasquez then reviewed what they felt were some of the benefits of the project, including: reduced vehicle motor traffic through provision of varied services in Spanish Springs Valley; lower trip generation than the approved PUD; better roadway facility to carry the traffic; north central location for restaurants and the movie theater; provides hotel accommodations in an area where none are provided; provides a public facility; a density bonus to the City for affordable housing; tax revenue generated by the resort; creates a synergy to support uses that are delayed in typical land patterns.

Mr. Vasquez concluded the ultimate issue is the agreement. He said the development agreement in 1994 was a big risk for the developer and exchange he was granted certain things under the agreement to make the development worthwhile. He said the agreement outlined exactly what the developer could expect down the road and while a lot of time has passed since then, the agreement is still, and should be, just as binding today as it was then.

Mr. Steve Mollath, an attorney representing the Red Hawk Land Company, the Lazy 8 Ranch and the Peppermill in the area of land use development, asked the Council to recognize that we are not talking about neighborhood casino issue, but that they were here to establish a transfer of a use from Wingfield Springs under an October 1, 2004 request, pursuant to a development agreement under Section 308B, to move an entitlement from the Wingfield property to the Tierra del Sol site. He then discussed the development agreement, stating that a development agreement is something that the Nevada legislature saw fit to put into place under chapter 278 that allowed developers who are going to come to Cities and to afford Cities who want to establish growth patterns and benefits for the community to come together on an agreement and contract so everyone knows how the development will take place over the period of time of the development agreement. He said this is not new or magical, but something the legislature has had in place for many years. Mr. Mollath emphasized that a development agreement is the same as a contract and that the development agreement of December, 1994 specifically allows this transfer. He said they believe that the movement of this project from Wingfield Springs location over to the Pyramid Highway is a better fit under the Master Plan and that the placement of this use on this particular piece of property is in the public interest of this community; however, the Planning Commission found that this project did not comply with the Master Plan and that it was not in the public interest to allow this project to go forward.

Mr. Mollath said he felt the only reason they were having a problem with this development was because this opposition had been planned and orchestrated by John Asquaga's Nugget, whose sole purpose is to prevent competition to its business. He said they were told there was no problem with a casino on the Pyramid Highway as long as it has 200 rooms, so they did that and then the rules of the game, as dictated by the Nugget, were changed and now they are saying the development agreement is invalid; the locational criteria is incorrect; and that they should go back 12 years and undo the agreement. He said basically the Nugget is asking the City of Sparks to breech this contract and assume all the adverse financial consequences of a breech of this contract after 12 years.

Mr. Mollath said that under ordinary circumstances, on a discretionary type of approval, the Council would take the input and weight it in their discretion; however, in this case there is a development agreement and that agreement requires both the developer and the City of Sparks to live up to the terms of the contract. He then discussed what would happen if the Council denied the application and what would happen if they approved the project. He emphasized that should the Council deny the project, then the developer must, in order to protect the financial investment he has made over the past 12 years, sue the City to enforce the provisions of the development agreement, which would have a huge financial impact on the City of Sparks.

Council Member Carrigan explained that the City has a lot of development agreements and this one is

about 20 pages long and it is probably the easiest one he has read. He said to put it into perspective; we just signed a 113 page development agreement with 25 addendums for the RED project at the Marina. He said that had he been on the Council back then, he was not sure he would have signed that agreement, but those were different times. Council Member Carrigan said that in looking at Section 7, which talks about what happens if the City backs out of this agreement, or if the applicant backs out of the agreement, he wanted to ask what number the City would be looking at if this went to court. Mr. Mollath said this could be a $100 million, plus cost to the City, because this is a very valuable entitlement. Mr. Harvey Whittemore said that they have had an analysis done which shows that the exposure could be as high, over a period of years, approaching $300 to $400 million dollars, but the bottom line is that this is a hugely important aspect of the entire development, because this development was unique because it was "front end" loaded, because the developer made it clear he was willing to incur that risk as long as he was going to be able to use 100% of the development rights, including the casino.

Mr. Whittemore said he wanted to make it very clear that they did not want to sue the City of Sparks; they want to enforce the existing agreement the way that it is.

Council Member Schmitt said there were a couple of comments made and he wanted to make sure that the City Attorney agreed with them. One was that if the project is approved, and someone files a law suit, then the applicant bears all court costs. Attorney

Creekman said that in past experience, if a law suite is filed against the City, always, the real party in interest is invited to participate. Sometimes they choose not to and they allow the City Attorney's Office to "carry the flag" on their behalf. He said based on what Mr. Mollath has stated, he sincerely doubted that this would happen in this case, so from that perspective he would anticipate that Mr. Mollath would be very active in the defense of the City and the City Council's action, thereby bearing the preponderance of the cost, although there would be costs to the City. Mr. Whittemore said that the City would enter into a joint defense agreement and 100% of the cost would be borne by the real party of interest, Red Hawk Land Company. He said he wanted to make it clear that they would not let the City suffer any financial loss with respect to defending this project. To supplement what Mr. Whittemore said, City Attorney Creekman said this offer was made to the City Attorney and the City Attorney rejected the offer during early discussions under the belief that it was inappropriate before there was an actual decision. Council Member Schmitt said he wanted assurance that there were no written agreements as to who was going to participate financially. Mr. Creekman assured the Council that there were no verbal or written agreements; and, in fact, it is precisely contrary: there was a verbal representation made which was expressly and explicitly rejected by the City Attorney.

Council Member Schmitt said he received a phone call regarding this issue, in that we don't have to worry as a City Council with a denial, that our

insurance company would pay any costs. He asked if Mr. Creekman could verify that our policy covers the City Council in terms of a decision like this and what the limitations would be. Mr. Creekman said he could not provide an answer because he was not familiar with the precise terms of the policy; however he could say that to the extent the matter is covered by our insurance policy, insurers base the premiums we will be paying in subsequent years on what they have had to pay out and he also concurs with Mr. Mollath's representation that the City's bond rating will likely suffer, having a tendency to make future projects more expensive for the City. Council Member Schmitt asked if staff could research this question and give him an answer later in the meeting.

Mr. Harvey Whittemore said this process has been extraordinarily difficult for a wide variety of people. He said he has been involved in the legislative process and planning and zoning issues all his professional life and he has never seen one that has resulted in the type of animosity, personal name calling, and the barrage of threats aimed at himself and his family. He said this project starts well before the early 1990's, as a result of his representation of a company called Howard Hughes in a project called Hughsight, which is now Summerland in Southern Nevada. As a result of their desire to enter into a major proposed development of over 250,000 people, they said that before we go through the process of developing a community of that size in the Las Vegas area, we are going to need some assurance that we are going to be able to build what we are going to be allowed to

build. As a result of that, development agreement statutes were passed in the State of Nevada.

Mr. Whittemore explained how he became involved in the Wingfield Springs project and the history of what occurred during the creation of the development agreement. He emphasized that the agreement clearly states that they can move development rights outside of the Wingfield Springs PC, but within the City. Mr. Whittemore then talked further about the development agreement and he was adamant about their right to build the casino at the Tierra del Sol location. He also mentioned that he would not benefit from the profits of the casino, but that they would go, in part, to fund UNR, disease research, and other charities.

Assistant City Manager Steve Driscoll said he had a response to Council Member Schmitt's earlier question regarding the City's insurance. He said that in our general liability insurance policies, there is a deductible on everything that goes through it, of $300,000, so this would by the City's responsibility. He said they would have to research the particulars of this question as to whether we would be covered as far as anything in excess, but typically breaches that deal with these types of contract breaks would not be covered because they are typically excluded because they are large dollar amounts. He said this would have to be confirmed, but there is a good chance that if there was a breach and the City was determined to be at fault and there was a large dollar amount, the entire amount would have to be carried by the City.

Council Member Schmitt said his concern has

been the legal aspects of the issue and the City Attorney's office has gone on record as saying that the development agreement is legal, and he felt it was important for the Council to understand what liabilities fall back on the City Council at this point.

Mayor Martini said he would open the floor to public comments, indicating several stacks of comment cards, he stated that one stack was from those that wanted to speak; another stack was those that did not want to speak, but wanted to show their opposition or support for the issue. He noted that everyone was allowed three minutes, but they did not have to speak the entire three minutes. He also asked that the speakers that planned to not to belabor the points already made. He also asked the audience to be professional; to take into consideration other people's feelings; and not to make any personal attacks, on either the applicants or the Council Members. He then opened the public hearing.

Council Member Carrigan asked each speaker to let them know if they were a City of Sparks resident, or if they were a resident of the unincorporated Washoe County area.

The following individuals spoke in opposition to the project:

Lynne Collins, 45 Desertscape Court.

Sharon Stumpf, 1673 Sue Way.

Cindi Henderson, 3074 Diamond Dust Court (former Council Member in 1994). She asked that their letter to the newspaper be made a part of

the record and that she was not speaking for or against the project; she just wanted to clarify some of the intent behind what happened in 1994.

Vaughn Hartung, 200 E. Sky Ranch Boulevard.

Cathy Reiners, 288 Omni Drive.

Beth Cooney, 2871 Brillie Dove Court, representing the Nugget, raised the issue of future casino expansions once the use is established.

Larry Harvey, 2245 Frisco Way.

Michonne Ascuaga, 1100 Nugget Avenue, CEO of John Asquaga's Nugget.

P. Sue Henderson, 5346 Santa Barbara Avenue.

John J. O'Leary, 1028 Sticklebrook Drive.

John K. Bradbery, 134 Andalucía Court.

Tom Flaherty, 7460 Adelaide Court.

Ted Krembs, 7440 Livi Court.

Malcolm Hall, former employee of Centex.

B. James Martin, 3269 Valley Forge Way.

Jim deProsse, 7390 Island Queen Drive.

Doug Flowers, 5441 Kietzke Lane, 2nd Floor, Reno.

Herman Stewart, 155 Stags Leap Circle.

Vernie McCrowhan, 309 Shelby Drive.

Roger White, 635 Valle Verde.

Melissa Clement, 3785 Erin Drive.

Joyce Field, 50 Harrison Pc.

Thomas Hullin, 2315 Contrail Street.

Mark Moser, 2720 Bankhurst Court.

Deborah Banks, 2541 Garfield Drive.

Jan McGinty, 55 E. Sky Ranch Boulevard.

Ira Hansen, 6500 Spanish Springs Road.

Roy Adams, 5655 Grasswood Drive.

Shirley Bertschinger, 832 Olancha Court.

Dee Parks, 15 N. Patterson Place.

Edes Hill, 2310 Adana Court.

Steven Peek, 1194 Mayflower Drive, Reno, an attorney representing the Nugget.

Marian Webb, 9435 Benedict Drive.

Jamie Singer, 715 Emerson Way.

J. Edward Parker, 6970 Pah Rah Drive.

Jim Robbins, 5245 Santa Rosa Avenue.

Viji M. Cox, 3755 Erin Court.

Beverly Johnson, 1358 Lubin Drive.

Rhonda Smithson, 245 Monumental Circle.

Neal Smithson, 245 Monumental Circle.

The following individuals spoke in support of the

project:

Ruby H. Anderson, 250 Veronica Avenue, (Washoe Co.)

Robert Derck, 6390 Black Deer Court.

Stacey Derck, 6390 Black Deer Court.

Terry Reynolds, 7473 General Thatcher (former City Manager) spoke to the validity of the intent of the development agreement.

Mike Hillerby, 914 Dolce Drive.

Lyle Mason, 7066 Poco Bueno Circle.

Heidi Loeb, 7495 Silver King Drive.

Natalie Okeson, 5949 Solstice Drive.

Karen Davis, 4580 Sillan Court.

Andrea Whittemore, 24660 Burtin Drive.

Don Lally, 5700 Falcon Ridge Court.

David Anderson, 6413 Adobe Springs Court.

Nicole Fontana, 7375 La Costa Street.

Tim Trimble, 2195 Rundy Way.

Pat Flynn, Sparks, representing the Peppermill.

Kim Stoll, 2707 S. Virginia Street, Reno, representing the Peppermill.

Skylo Dangler, 5929 Solstice Drive, Representing Wingfield Springs.

Martin Amba, 4711 Paso Robles Court.

Marc Johnson, 2460 Burtin Drive.

The following individuals were present in opposition, but did not wish to speak:

David West, 1205 Stanford.

Corwin West, 4716 Pradera Court.

Nick & Lorrie Turner, 5690 Dolores Drive.

John L. Sullivan, 85 E. Sky Ranch Boulevard.

Debra Kallas, 30 N. Desert Springs Circle.

Kathryn Trabitz, 4[illegible]33 Bareback Court.

Elizaveta Rechetnik, 7380 Aquene Drive.

Nettie Hansen, 2105 Madera Court.

Adrian Eriksen, 235 Sunset Springs.

Jonathan Conley, 1507 G Street.

Michele Salonek, 1592 Satellite.

Danielle Donica, 25 N. Tropicana Circle.

Chris Donica, 25 N. Tropicana Circle.

Herbert Blanck, 6986 Poco Bueno Circle.

Olga Blanck, 6986 Poco Bueno Circle.

Philip Daly, 328 Quini Drive.

Thomas Jones, 5260 Mesa Verde Drive.

Michael Oltman, 1215 Turnberry Drive.

Melissa Taveria, 5540 Dolores Drive.

Karen Nance, 140 Landmark Drive.

Lawana Carter, 1506 Palmwood Drive.

Tom Comstock, 4475 Block Diamond Drive.

Ted Johnson, 1011 Sageview Drive.

Chris Johnson, 1011 Sageview Drive.

Lyly Gelles, 8865 Eaglenest Road.

William H. Kip, 3357 Toledo Court.

Vicki Pillers, 5515 Grasswood.

Tamara Root, 2323 Soar Drive.

Gregory Root, 2323 Soar Drive.

Bruce Root, 417 "H" Street.

Judy Root, 417 "H" Street.

Thomas L. Nickovich, 69 Palm Springs Court.

Tyson Andehr, 8100 Pyramid Highway.

Donna Hunter, 248 Prater Way.

Pablo and Diane Aguirre, 449 Gomez Court.

Mark Andiline, 8100 Pyramid Road.

Susan Roberts, 3225 Apio Court.

Carrie Wiker, 3347 Poco Dove Court.

Barandon Allen, 3240 Millstone Court.

Doug Stafford, 5565 Grasswood Drive.

Dawn Johansen, 330 Moonbeam Drive.

Shonda Williams, 9140 Benedict Drive.

Chris Obringer, 11075 Heartpine Street.

Lynn Vind, 345 Moonbeam Drive.

JoAnne Sunstrom, 335 Moonbeam Drive.

John Johansen, 330 Moonbeam Drive.

Karl E. Rodriguez, 365 Moonbeam Drive.

Nicolas Ruiz, 1924 Woodtrail Drive.

Jacob Singer, 715 Emerson Way.

Anita Phillips, 1140 Fuggles Drive.

Beth Lau, 4964 Hangarten Drive.

A. Lewis, 150 El Molína Drive.

Truman Mathews, 1072 Greenwing Drive.

Debbie Trambetta, 4891 Monte Rio Court.

Chase Whittemore, 2215 Hedgewood Drive.

Proctor Hug, 2260 Hedgewood Drive.

Ron Gribble, 6399, Toronto Court.

Joyce Eriksen, 235 Sunset Springs.

Connie Nevins, 175 Carlene Drive.

Cassandra and Ian Griere, 465 Tranquil Drive.

Dave Galleron, 635 Calle de la Plata.

Steven Thoma, 55 E. Sky Ranch Blvd.

Janean and Lynn Peterson, 906 Victorian Avenue.

Lillian Partos, 7874 Tormes Court.

Gerald Fassett, 40 N. Tropicana Circle.

Bonita and Robert Curtis, 30 N. Spring Mountain Circle.

Sarah Mahler, 340 Moonbeam Drive.

David W. Walker, 35 Geraldine Court.

Cheryl Benson.

G. Malcolm and Cindy Hall, 3775 Erin Drive.

Ralph A. and Wanda R. Prukop, 4985 Santa Barbara Avenue.

Michael Dillon, 65 E. Sky Ranch Blvd.

Jeanne Mullennix, 40 White Dove Court.

Chuck Clement, 3785 Erin Drive.

Jennifer O'Neil, 4325 Primavera Avenue.

Cindy Duer, 60 Carneros Drive.

Ken Mendenhall, 1075 Rheingold Court.

Cindy Kimball, 5565 Wedgewood Circle.

Ken Nevias, 175 Carlene.

Dennis Galleron, 240 Sunlit Terrace.

Roy Hall, 11765 Canyon Dawn Drive.

Trudy Trainor, 810 Leport Way.

Sandra Randall, 3430 Terishile Drive.

LaFern Mears, 6610 David James Blvd.

Wanda Little, 15 Valerie Circle.

Daisy Genio, 7455 Aftspring Drive.

Davis Moore, 3350 Grove Springs Drive.

Maria Rodriguez, 365 Moonbeam Drive.

Vance Antonelli, 700 C Street.

Frank Gonzales, 35 Alexis Court.

Russell Pillers, 5515 Grasswood.

Scott Franzwa, 240 Nicole Drive.

Diana Exline, 6805 Eagle Wing.

Donald and Robin Diehl, 91 Ringneck Court.

Dennis L. Moore, 3350 Grove Springs Drive.

Susan Sunday, 5650 Grasswood Drive.

Steve Witt, 315 Tina Circle.

Duane Brown, 150 Rosetta Stone Drive.

Linda Joeline Jamieson, 8036 Miramar Court.

Leopolda R. Barajos, 1877 El Rancho Drive, apt. 54.

Barbara Matlock, 2525 Westview Boulevard.

Shirley O'Leary, 1028 Sticklebract Drive.

Shannon Waldrop, 3631 Longridge Drive.

Jean N. Lewis, 1012 Bradley Square.

Elva Wells, 478 Steffain.

Jerri Eby, 1184 Jason Drive.

Chris Gann, 90 May Drive.

Bert Love, 155 Veronica Avenue.

Jerri McDonald, 5565 Grasswood Drive.

Kathy Maclosek, 510 Hawk Bay Court.

Rendell and Linda Banks, 2525 Westview Boulevard.

Jeannie Adams, 5655 Grasswood Drive

Suly King, 2525 Westview Boulevard.

H. Lawrence Fick, 1156 Dortmundeh Drive.

Dawn C. Hammond, 7436 Ash Peak Drive.

Paul Byers, 35 W. Sky Ranch Boulevard.

Debbie Barriault, 620 H Street.

Luella and Frank Hill, 4765 Goodwin Road.

Bobbie Barriault, 620 H Street.

LeNora Greenen, P.O. Box 743.

Cherri Fennel, 1503 G Street.

Lydia Gomez, 1503 G Street.

Leticia Miller, 7808 Bareback Drive.

Joy L. Harrison, 3251 Millstone Court.

Terry Maine, 701 Canyon.

Zac Cooper-Chadwick, 3140 Manzana Court.

Rodolfo Velasco, 3146 Montezuma Way.

Barbara Heimerdinger, 2326 Ruddy Way.

Jamie Huff, 5396 Santa Lupe.

Bob Bertschinger, 832 Olancha Court.

Joy and William Naprstek, 4373 Bareback Court.

C.G. Cox, 3755 Erin Court.

David J. and Nancy Cencula, 9145 Cordoba Boulevard.

Sandy Richardson, 20 Bridle Path Court.

Joe Lopez, 20 Bridle Path Court.

Eleanore S. Collier, 49 Marilyn Mae.

Irene Connors, 2326 Abacus Court.

Wilma Bennett, 3683 MacArthur.

S. Herr, 316 California Avenue #878.

Marci Howser, 1680 Talking Sparrow Drive.

Randy Connors, 2326 Abacus Court.

Donna Green, 1800 Prater Way, #C6.

Joyce E. and John Baird, 4650 Sierra Madre Drive #813, Reno, 89502.

Pamela Riede, 625 Tranquil Drive.

Rita S. Kahl, 7828 Cangdejo Court.

Glenda Jacobson, 7455 Lorna Lane.

Barb Bauane, 7282 Little Casy Street.

Valerie Jakubos, 55 Valerie Circle.

Wayne P. Fitch, 45 Anthreka Court.

Jennifer Bascom, 2105 Stone View Drive.

Steven Asquaga, 1100 Nugget Avenue.

Dennis McCrohan, 309 Shelby Drive.

Ann Reiff, 5100 Wilcox Ranch Road.

Jacob C. Glass, 665 Tranquil Drive.

Valdine Renucci, 5213 Palo Alto.

Eugene L. Trabitz, 4333 Bareback Court.

Marion R. Slay, 2594 Betsy Street.

Adam Bass, 4861 Monte Rio Court.

Carolyn N. Snow, 1456 Arona Drive.

Hardy Mullennix, 40 White Dove Court.

Michael Wessman, 237 Sunset Springs.

Paul Ortiz, 80 Saint Lawrence, Reno, 89509.

Miguel Villegus, 828 Woodglen Drive #5.

Dorothea Combs, 620 19th Street.

Dell Vargas Gomez, 6840 Prestwich Circle.

Lynette Halsey 6645 David James Boulevard.

Melina R. Rourke, 2780 Arrowsmith Drive.

Larry and Debbie Leukhardt, 7060 Annabelle Drive.

Traci Allen, 3240 Millstone Court.

Patricia Swain, 15 Desert Springs Circle.

Carolyn Lindsay, 15 S. Heena Court.

Thomas Jamieson, 8036 Miramar Court.

Teresa J. Rodriguez, 270 Veronica Avenue.

Fred Horlacher, 1395 Nightingale Way.

Ken Robbins, 815 Olancha Court.

Nina Hogan, 9220 Cordoba Boulevard.

Susan Weyl, 2230 Piedras Road.

Virginia Loessberg, 280 Veronica Avenue.

Pedro Rodrigez, 270 Veronica Avenue.

Donna and Eugene Whelchel, 325 Alamosa Drive

Olivia Bouch, 70 Horse Springs.

Emily Robbins, 816 Olancha Court.

Jesse and Paul Danen, 7889 Guerra Court.

Karla M. Rollins, 1100 15th Street #7C.

Janae and David Maher, 5635 Grasswood Drive.

John G. and Carolyn L. Williams, 220 Mystic Mountain Drive.

James Daria Wallace, 7808 Covered Wagon Court.

Sheryl and William Sherman, 6969 Jermann Court.

Kyle Labarry, 4344 Roundstone Court.

Angela and Andrew Morss, 329 Shelby Drive.

Harold Roberts, 3225 Apio Court.

Amy Obringer, 11075 Heartpine Street.

Patricia Buffington, 55 Cameros Drive.

Tim and Dawn Hunter, 79 Cadwall Court.

Linda and Norman West, 4716 Pradera Court.

Judy Harper, 3773 Arcturas Court.

Lourita Parker, 290 Omni Drive.

Linda Williams, 2230 Piedras Road.

Margaret McCarron, 1558 C Street.

Robert Gennette, 12 Lincoln Way.

Rose Marie Donohue, 4353 Bareback Court.

Desley Stafford, 5585 Grasswood Drive.

Mike Maciosek, 510 Hawk Bay Court.

Karl Kononchuk, 575 Tranquil Drive.

Mary Burlie, 4330 Bareback Court.

Maria Campos, 51 Badger Creek Court.

Melinda Campos, 51 Badger Creek Court.

Jess Campos, 51 Badger Creek Court.

Rusty Flowers, 51 Badger Creek Court.

Ray Duer, 60 Carneros.

Ouida W. Craddock, 675 Parlanti Lane #139.

Alice B. Yoakam, 675 Parlanti Lane #139.

Rose Baker, 15 Mac Street.

Steve Burlie, 4330 Bareback Court.

Leslie O'Day, 3430 Grove Springs Drive.

Harriet R. Duran, 148 Andalucia Court.

Nancy Trabert, 1755 Trabert Way.

Robin Helweg, 144 Andalucia.

Ann Foley, 1610 Billow Drive.

The following individuals were present in support, but did not wish to speak:

Rand E. Tanner, 7052 Cinnamon Drive.

Shen Hui, 5625 Vista Luna #103.

Niu Su Rong, 5625 Vista Luna.

Shen Hong Cheng, 5635 Vista Luna.

Shen Li, 5635 Vista Luna.

Jenny Shen, 5625 Vista Luna #103.

Mei Hu, 5725 Camino Verde Drive.

Andrew Briswalter, 5725 Camino Verde Drive.

Marita Pinedo Rodriguez, 185 E. 1st Avenue, Sun Valley.

Baldo Vargas 2159 Albatross Way.

Jenny Wilson, 6060 Ingleston Drive #1221.

Yvette Deighton, 10 Carefree.

Annette Whittemore, 2215 Hedgewood Drive.

Mike Wilson, 5300 Los Altos Parkway #183.

Beth Wilson, 5300 Los Altos Parkway #183.

R. Whittemore, 7019 Whitemare.

Janet DiGiulio, 6578 Aston Circle.

Trevor Lloyd, 4161 Mystery Drive.

Benedict DiGiulio, 6578 Aston Circle.

Emily Cornwall, 5791 Ambush Ridge Court.

David E. Snow, 1459 Aron Drive.

Diane Dwyer, 2501 Garfield Court.

Charles R. Carpenter, 1107 Bradley Square.

Cathy Dangler, 5929 Solstice Drive.

Ryan Marsh, 2851 Chavez Drive.

Robert Coclich, P.O. Box 366, Sparks, 89432.

Lynda Murdock, 2420 Burtin Drive.

Earl J. and Dorris Crank, 23 Marilyn Mae Drive.

Christia Ahl, 1800 Sullivan Lane.

Rovalea Sauth, 1365 Russell Way.

Stephanie Kolko, 2876 Granville Drive.

Heidi Robbins, 5246 Canyon Rim Court.

Greg Andrew, 1426 Talon Drive.

Fred Harvey, 1391 Satellite Drive.

Cari West, 2417 Lawry Drive.

Clay Meininger, 6060 Ingleston Drive #122.

Daze Rew, 5998 Solstice Drive.

Dave Richardson, 6804 Cinnamon Drive.

Tom Steinberg, 54 Marilyn Mae Drive.

Nate Kaplan, 3275 Cashill Boulevard.

Carl Savely, 305 Alamosa Drive.

Debi Bladis, 10295 Mogul.

Ray and Nicole Fontana, 7375 LaCosta Street.

Mernie Irwin, 342 Jimmy Court.

Sherry Irwin, 342 Jimmy Court.

Dave and Bonnie Carsten, 1060 Mercedes Drive.

Garry Hill-Thomas, 565 Sparks Blvd.

James Wiggins, 565 Sparks Blvd.

Sean Paul, 1364 Buena Vista Avenue.

Maggie and Brandon Kingsbury, 3657 Hillsdale Court.

Al Karsuk, 5909 Solstice.

Roxanne and Mickey Doyle, 2390 Mammatus Drive.

Jerry and Kellen Monick, 3240 Dunbar Court.

Ann and Jim Fowler, 3662 Copernicus Court.

Rosa Torres, 4695 Aster Drive.

Remedios Guerrero, 185 Hubbard Way #B.

Maricela Villasener, 4760 Persimmon Road.

Herberto Moya, 350 E. Grove, Reno.

Bert and Andrea Soffiotto, 5935 Ingleston Drive.

Carmen and Molve Johnson, 8955 Spanish Trail.

Tim Trimble, 2195 Ruddy Way.

Jack Chesney, 20 Chesney Court.

Naoma, Cliff J., and Howard Luzier, 6643 Dorchester Drive.

Kathleen Boyer, 1973 Rio Tinto.

Ursula Wellman, 2000 Bucky.

Drucilla Richardson, 2005 Haywood Drive.

Ronald and Mandy Robbins, 5240 Canyon Rim Court.

William Brainard, 7326 LaCosta.

Greg Deighton, 10 Care Free.

Katie Wilson, 3657 Hillsdale Court.

Aimee Giller, 2433 Lawry Drive.

Luz Carrenza, 555 Stokade Drive.

Mayor Martini noted he received a letter from Mr. and Mrs. Fred Barry in opposition to the project, citing traffic concerns.

There being no other individuals present who wished to speak, Mayor Martini closed the public hearing at 11:30 p.m. and returned the meeting to the Council for action.

Senior Planner Tim Thompson said there was a lot of talk tonight about "quality of life" and one of the indicators of quality of life is traffic and vehicle miles traveled. He said the City established the

NSSOI Plan in 1991 and this plan was a fairly good plan for 15 years ago and there was quite a bit of residential included in that plan; however with the number of residents we are expecting in Spanish Springs, it would be foolish for the City to not consider changing our Master Plan to allow the commercial businesses that we are now seeing come to fruition on the Pyramid Highway. He said that one of things that Sparks has done through the 2002 Regional Plan Update Process is to designate this area as an emerging employment center ... the idea being "Live/Work/Play" ... people can work where they live and shop where they live, and that is what we want to see. He said this reduces the number of miles vehicles have to travel and reduced vehicle miles traveled translates into a better "quality of life".

Mr. Thompson pointed out that if Spanish Springs is only 50,000+ residents and there are no services or jobs, every one of those residents will be forced to drive along the Pyramid Highway, Sparks Boulevard, Vista Boulevard into Sparks and Reno to do their business.

Mr. Thompson emphasized that we change our Master Plan frequently and State allows us to change the Master Plan four times a year and staff consistently gets requests to change the Master Plan; however, we have not had a complete update of our Master Plan since 1991. He said that in those 15 years many things have changed and it is the job of staff to guide that change. He said Council Member Schmitt did a good job of discussing taxes and how taxes are distributed and what we, as a City are charged with, is finding the highest and best use for

a piece of property and that translates into high assessed value. He emphasized there needs to be a balance, because single-family residential development, in the long run does not pay for itself and that balance comes from projects that bring the City a high assessed value and those are commercial, industrial, business park, high density multi-family and office type projects.

He said there had also been talk about "family environment" and one of the things that the City required was that the developer make the movie theater, the restaurants and the hotel accessible from the outside without having to go through the gaming floor.

Mr. Thompson said someone also brought up the issue of lighting. He said this is addressed in the handbook and the standards in the handbook will ultimately guide this development. He said in the staff report there is a paragraph on lighting and the requirement for cut-off luminaries, no lighting directed up into the sky, etc. He said City staff is very aware of concerns with regard to lighting and one of the things that we would require, prior to the issuance of a building permit, is a photometric plan which shows the location of the lights, to ensure the lighting does not exit the parameter of the property. Mr. Thompson said that many people may or may not see the difference between the lighting at Kohl's and Wal-Mart, but there is a clear difference in the lighting standards that were utilized by Wal-Mart and those used by Kohl's. He said that since Wal-Mart installed their lighting, the City has really looked into making those types of fixtures a requirement because they severely reduce the

amount of lighting that projects up into the air.

Mr. Thompson said he also heard comments about the supplemental development agreements. He said this 1994 agreement does require that the City enter into a supplemental development agreement with the applicant which deals with the specifics of this project. He said this project is entitled in Wingfield Springs and in order to move this use to Tierra del Sol, essentially the use is detached from Wingfield Springs (or removed from the handbook) and it is then incorporated into the Tierra del Sol handbook. He explained that there are actually applications: one application to amend the Tierra del Sol handbook; the other application is to amend the Wingfield Springs handbook. He noted that in the staff's motion for approval to the Planning Commission, and should the Council chose to approve this project, staff's recommendation is that it be conditionally approved, subject to the City entering into that supplemental development agreement with the applicant and dealing with all these issues prior to the final approval process for the handbook.

Mr. Thompson pointed out that the property associated with the Tierra del Sol handbook was annexed in 1999 and the handbook was also adopted in 1999, so this is not something that is occurring now, it happened back in 1999.

Council Member Schmitt asked for clarification on the supplemental agreements that were required. Mr. Thompson said the intent of this supplemental development agreement is to nail down the specifics of the development and he would anticipate

including in the development agreement is the language that is included in the current Wingfield Springs handbook, which restricts the amount of casino related activities to 100,000 square feet and the amount of actual gaming floor to 18,000 square feet, of which only 50% can be slot machines. Council Member Schmitt asked if there were any Nevada Revised Statutes (NRS) or other procedures that outlines this process. Mr. Thompson said he believed there was some language in the Wingfield Springs handbook, under the resort designation, that does discuss how this would be processed.

Mr. Thompson further explained that say in 10 years, if they wanted to expand the 18,000 square feet of gaming floor, the handbook contains language, so that if this were to happen, there is a process established, which includes the City Council and the Regional Planning Agency. Council Member Schmitt asked if the Council could condition their approval so that the gaming floor was strictly restricted to 18,000 square feet and that it can't, under any circumstances, be increased.

Council Member Salerno said he was still confused about the traffic issue, stating he did not understand how it would not increase traffic. Community Development Director Neil Krutz explained that there is a forecasted reduction in traffic with this particular amended proposal when compared to the Tierra del Sol project that was approved in 1999, which can be contributed to the difference in the type of use proposed. It was originally proposed as a general commercial center (shopping, fast food, restaurants) with uses of relatively short duration. He said the entertainment

center would mean that the patrons would stay longer, so the number of trips on any given day would be lower, lower by about 1,000 trips. He said something else that would have to be considered is that with a general commercial project there was a more even split between trips in the morning peak hour and the evening peak hour; whereas with an entertainment complex, the trips would be more focused in the evening peak hours than in the morning [peak hours]. This would have to be considered when it came time to look at the design plans to provide the road infrastructure in and out of the center. He emphasized that it doesn't go toward the requirement for the number of lanes, but it goes toward how the intersections are designed: the length of the turn bays; how the intersections are timed, etc.

Council Member Mayer commented that he was upset that this issue seemed to have put a wedge in this community and he hoped that which ever way this project goes, that the damage done to our community would heal.

Council Member Carrigan, said he wished this was only about a casino, but the decision would be much easier; however, it isn't just about a casino, it's about honoring a contract the City Council signed in 1994. He said that according to both our legal staff and our community development staff, we need to honor the contract and one of his concerns was how many development agreements we have and if this issue will come up again. He said had he been on the Council in 1994, he would like to think he would not have approved an agreement like this. Council Member Carrigan asked the audience to understand

the decision the Council has to make and the consequences of their decision: if they vote yes, we're going to court; and if they vote no, we're going to court. He emphasized that his job was to protect the citizens of Sparks and make the best decisions he can.

Council Member Salerno commented that he felt this was really a regional issue that affected not only the citizens of Sparks, but also those in Washoe County, across the road from this project. He said it goes without saying that this will be a first class, quality product, but he felt that there was still a lot of confusion about what is the right thing to do.

Mayor Martini said he was very proud of all the City Council Members for taking in stride the "beating" they have been given [from the citizens] over the last few months on this issue. He said this issue has gone on long enough and one way or another it will be decided tonight. He thanked everyone who spoke for being respectful and acting with decorum, regardless whether they were for or against the casino.

Council Member Schmitt said that one of the things he loves in life is traveling, but best part of every trip he takes is coming home to what he considers the greatest City, in the greatest State, in the greatest County in the world. He said we all can be very proud of participating in democracy in action at this meeting.

Council Member Moss said she has given considerable thought to both sides of this issue and listened carefully to the arguments on both sides.

She said that regardless of what is built on this property, there will be traffic on Pyramid. She said that her hope is that the community is able to come back together on other issues and not remain divided.

Council Member Carrigan made a motion to grant tentative approval of PCN05073 and requested that this approval be a roll-call vote.

Council Member Schmitt said he wanted to make a couple of amendments to the motion: that it is made clear that there is to be no future expansion of the 18,000 square foot of gaming floor area; and that we work on a tax structure so that as taxes are generated by this project, that 50% of the tax revenues be diverted back to the downtown area to help support redevelopment and special events.

Attorney Creekman asked if the second part of Council Member Schmitt's motion was a merely a suggestion for staff to look into the possibility of doing this, or if it was an obligatory direction. Council Member Schmitt said this was a directive to staff to work out this agreement and bring it back to Council to approve. Attorney Creekman said that staff can certainly look at the possibility of doing this, but he had sufficient doubts about local government taxation at this time to commit that what he is proposing is legally permissible. Council Member Schmitt asked when Mr. Creekman felt we could get an opinion on the legality of doing this. Mr. Creekman said it would probably take six weeks or longer.

Council Member Mayer requested that

parliamentary procedures be followed and that Mr. Schmitt make a motion to amend Council Member Carrigan's motion and that Council Member Schmitt split his amendments into two separate votes.

Council Member Schmitt then made a motion to amend Council Member Carrigan's motion to make sure the 18,000 square feet is the maximum the gaming area, per in the agreement. The motion was seconded by Council Member Carrigan. Council Members Moss, Carrigan, Schmitt, YES. Council Members Mayer Salerno, NO. Motion carries.

Council Member Schmitt then made a motion to amend Council Member Carrigan's motion that if the project is approved tonight; an agreement be brought back to the Council, in whatever legal format that we can do, to redirect a percentage of the funds from the taxes that are generated from this project are redirected to downtown redevelopment. Attorney Creekman said it was not necessary to make a motion on this, that the council could simply direct the Attorney's Office to look into this.

Mayor Martini asked if there needed to be a motion to hold a roll-call vote. Attorney Creekman said he did not believe it was necessary.

Council Member Moss said that it was clear that Section 3.08 said that we would come back and talk about a supplement agreement within the City and her concern, and that of the Planning Commission, was that Tierra del Sol was not within the City in 1994; it was part of the Sphere of Influence, but not in the City. And if the other sections of the agreement are "frozen in time", then the boundaries

of the City when the agreement was signed should also be "frozen in time". Mr. Thompson explained that essentially the agreement had a lock-in clause that freezes in time the plans that were in effect at the time the development agreement was adopted. It does not include the corporate boundary as well. He clarified that the agreement did not freeze in time the existing corporate boundary of the City in 1994.

Council Member Moss said the project is great; but the issue for her was whether this was the right place for the project. She said she also had some concerns about the Regional Planning Commission and what they originally said in November of 1994 related to the project and she felt this project needed to go through the Regional Planning Commission because it has been substantially changed. Mr. Thompson responded that staff does not believe that the project, as proposed in Tierra del Sol handbook, is required to go back to the Regional Planning Commission as a project of regional significance, or otherwise, because when Tierra del Sol was originally approved in 1999, it was approved for 200,000 square feet of commercial/retail use. He said a project of regional significance would be one that generated traffic in excess of 6,250 average daily trips and Tierra del Sol already went to the Regional Planning Commission and was subsequently approved. He said this change in the plan actually has fewer average daily trips than the original plan and because there is no increase in the intensity of the project, staff believes it is not required to go back for Regional Planning Commission approval.

City Clerk Debi Dolan then conducted a roll-call vote.

A motion was made by Council Member Carrigan, seconded by Council Member Schmitt for tentative approval of PCN05073, to tentatively approve the amendment to the Tierra del Sol Planned Development Handbook; limiting the allowed gaming floor area to 18,000 square feet now and in the future. This recommendation adopts Findings PD1 through PD21 and the facts supporting these findings as set forth in the Planning Commission staff report. The tentative approval includes the requirement that the applicant shall file the application for the final approval for the first phase of the planned development within one year from the date of the City Council granting tentative approval of the planned development handbook, and that the final handbook level of detail is equal to that which is required by a Special Use Permit, although a Special Use Permit is not needed. The tentative approval requires that the Wingfield Springs Planned Development Handbook be amended to remove the resort complex and a development agreement to supplement the 1994 Wingfield Springs Development Agreement be approved by the city that must include the modification to the Wingfield Springs Handbook, provide socially beneficial contributions and details regarding the transfer of the gaming component to Tierra del Sol; and that the supplemental agreement also include a condition that the architectural renderings displayed at tonight's meet are what is built; that the 200 room hotel and casino be built concurrently and that the movie theater and arcade be directly accessible by the public without going through the casino. These requirements are a prerequisite to Final Approval. Due to the nature of the tentative planned

development, the Planning Commission does not recommend that the City Council require a bond at this point in time as stated in NRS 278A.490. Council Members Carrigan, Schmitt, YES. Council Members Mayer, Salerno, Moss, NO. Motion Failed.

Senior Assistant City Attorney David Creekman said that since the last motion failed, someone should make a motion to the opposite effect. Mayor Martini asked if someone wanted to make a motion to decline. Mr. Thompson noted that on page four of the staff report there was a motion for denial. City Council Member Mayer asked Mr. Thompson read the motion from the staff report.

A motion was made by Council Member Mayer, seconded by Council Member Moss, to deny the tentative planned development handbook for Tierra del Sol, PCN05073. The project is not in the public interest as it relates to PD findings 18 and 21. The project as submitted and conditioned is not consistent with the City of Sparks Master Plan as the graphic depictions of land use designations in the City of Sparks prevail over the text of the NSSOI Plan and the graphic designations associated with the General Commercial land use designation do not permit resort hotels with gaming. Additionally, the proposed modification of the Tierra del Sol planned development does not further the interests of the City because the Master Plan serves as the ultimate policy and guidance for land use development in the City. Council Members Mayer, Salerno, Moss, YES. Council Members Carrigan, Schmitt, NO. Motion Carried.

Time: 12:33:44 p.m.

9. Comments from the Council and City Manager

None

Time: 12:33:50 p.m.

10. Adjournment

There being no further business, the meeting was adjourned at 12:33 a.m.

August 23, 2006 Partial City Council Transcript

Mike Carrigan Disclosure
6:07:11
Thank you Mayor. I have to disclose for the record something, uh, I'd like to disclose that Carlos Vasquez, a consultant for Redhawk, uh, Land Company is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight therefore according to NRS 281.501 I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue. Thank you.

Geno Martini Disclosure
6:07:47
I also need to disclose, I don't vote, but, uh, disclose the same information, uh. Mr. Vasquez is a friend of mine also. Also my campaign manager. I do not stand to gain anything from this particular project should it be approved. Uh, I just wanted to have that on the record.

RECEIVED
OCT 30, 2006
COMMISSION
ON ETHICS

[Retain Mike Carrigan For Sparks City Council Campaign Letterhead]

October 26, 2006

L. Patrick Hearn
Executive Director
State of Nevada Commission on Ethics
3476 Executive Pointe Way, Suite 10
Carson City, NV 89706

Dear Mr. Hearn,

This letter will serve as a response to the request for opinion No.s 06-61, 06-62, 06-66 and 06-68. I hope that this letter will serve as a response to all four complaints since they are all worded similarly. If not, Mr. Hearn, I will be glad to provide a separate letter for each request for opinion.

In early August, I asked for a legal opinion from the Sparks City Attorney, Chet Adams, on an issue that was coming before the Sparks City Council that my friend Carlos Vasquez was the public relations

consultant for. On August 17, 2006, the City Attorney supplied the mayor and city council with a memorandum, Enclosure 1. In the memorandum, it was made clear that I was not conflicted. Often times I have voted on issues that were brought before the city council by friends and members of the community. Sparks is a small community and at no point in time do I feel that my judgment was clouded because of these relationships.

According to the memorandum, if the personal relationships in which I am involved may give rise to allegations of bias against me, I should simply err on the side of caution and disclose the relationship before I vote on the issue. According to Enclosure 2, an email from the assistant city attorney David Creekman, I disclosed before the meeting that Carlos Vasquez is a friend of mine and that I was not going to gain financially and the personal interest I had would not cloud my judgment.

Thank you for the opportunity to respond to the allegations made against me. I am available to discuss the matter further.

Regards,

/s/

Mike Carrigan
Sparks City Councilman

Enclosure 2

Creekman, David

From: Carol Creekman [carolcreek1@charter.net]
Sent: Thursday, September 21, 2006 5:33 PM
To: Creekman, David
Subject: Fw: Possible conflict of interest disclosures

—Original Message—
From: Mols, Sally
To: Carol Creekman
Sent: Wednesday, August 23, 2006 3:47 PM
Subject: RE: Possible conflict of interest disclosures

David, I'm forwarding via email as requested and also putting hard copies on their respective desks. Randy arrives here shortly for an early dinner with Adam and Steve so I will hand him a copy.

From: Carol Creekman [mailto: carolcreek1@charter.net]
Sent:: Wednesday, August 23, 2006 3:43 PM
To: Mols, Sally
Subject: Possible conflict of interest disclosures

3:40 p.m. Wednesday, August 23, 2006
Sally: I am at home just now preparing for tonight's meeting and ask if you please can do me a favor. Please forward this email to each member of the City Council, the Acting City Manager and the Mayor as soon as possible.

Thank you.

David Creekman

Dear City Council Members:

I write to remind each of you, in accord with the legal opinion previously provided to you, to be certain to disclose any possible financial or personal interest you might arguably have with respect to the project (or the individuals involved in the project) you will be hearing tonight. Once that disclosure has been made, you need to conclude that the possible financial or personal interest will, or will not (as the case may be) cloud your judgment with respect to the issue before you. If you believe that your judgment will be impaired as a result of any financial or personal interest you might disclose, you should recuse yourself from the

09/22/2006

Enclosure 1

MEMORANDUM

TO: Geno Martini, Sparks City Mayor
Shaun Carey, Sparks City Manager
Sparks City Council Members:
John Mayer — Phil Salerno
Judy Moss — Michael Carrigan
Ronald Schmitt

FROM: David Creekman, Senior Assistant City Attorney
Doug Thornley, Legal Intern

DATE: August 17, 2006

SUBJECT: Bias or predisposition as grounds for disqualification of elected official

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We have looked into the question of whether predisposition or demonstrable bias are grounds for the recusal of an elected official when that elected official is charged with responsibility for later deciding, in an official capacity, an issue relating to the subject matter where bias is alleged to exist. Because we are unaware of any facts establishing the existence of financial or personal gain or loss,[1] it

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[1] Other than the possibility of simple personal connections and friendships which formed the basis for an Opinion of the Nevada Attorney General, 98-27, issued on September 26, 1998, on this subject. That opinion concluded that abstention

is our legal conclusion that previously-revealed positions which may indicate a predisposition on a matter before the City Council do not require the recusal of an elected member of the City Council.

"Elected officials are presumed to act objectively," and at least a minimal showing of bias must be made to warrant a remand. *See, Fairview Area Citizens Taskforce v. Illinois Pollution Control Board*, 198 Ill. App. 3d 541, 548, 555 N.E.2d 1178, 1182, 144 Ill. Dec. 659 (1990)(appeal of a decision of the Illinois Pollution Control Board upholding a previous decision of the Village of Fairview Village Board in which the appellants questioned whether the procedures employed by the Village Board were fundamentally fair due to preexisting bias on the part of members of the Village Board). In *Breakzone Billiards v. City of Torr ıce*, 81 Cal. App. 4th 1205 (2000), the city's planning commission granted an applicant's request for a liquor license. On appeal, the Court held that the plaintiff was not denied a fair hearing by the fact that four members of the city council had received campaign contributions from a donor who might have benefitted from the denial of the plaintiff's request. The Court further held that the fact that a city council member who also sat on the planning commission brought the appeal to the city council in his capacity as a member of the planning commission, and then participated in the

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is only required where there exists objective evidence that a reasonable person in the public official's situation would have his or her independence of judgment materially affected by a commitment in a private capacity to the tangible interests of others.

city council hearing, did not result in an unfair hearing. *Id.* at 1224.

An elected official's positions on certain matters are often the basis of that official's election in the first place. To disqualify these officials from voicing their opinions and fulfilling their duties accordingly would be contrary to the basic principles of a democratic and free society. *See, Wollen v. Borough of Fort Lee*, 27 N.J. 408, 142 A.2d 881 (1958).[2] In this regard, attention should also be directed to *Saks & Co. v. City of Beverly Hills*, 107 Cal. App. 2d 260, 237 P.2d 32 (2d Dist. 1951)(*disapproved of by City of Fairfield v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952) and *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543, 537 P.2d 375 (1975)), in which the court held that where three of five members of the city council were disqualified to vote

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[2] In the *Wollen* case, the issue at stake involved the validity of an ordinance purporting to amend and supplement the zoning ordinance of the Borough of Fort Lee. The amendment would reduce the land area of a zoning district previously restricted to one-family residence use and a minimum lot area of 10,000 square feet, and constitute in its place a new multi-story apartment district open to apartment houses not in excess of six stories in a portion of the zoning district and not in excess of 14 stories and elsewhere in the zoning district. As part of the appeal, arguments were raised that three members of the Borough's council "had, while they were candidates for election to the Borough Council...publicly announced that if elected they would vote in favor or rezoning...for multi-family dwellings," and that they were thereby disqualified from participating in the enactment of the ordinance. The Court rejected this argument, stating that it needed to do so because to decide otherwise "...would frustrate freedom of expression for the enlightenment of the electorate that is of the very essence of our democratic society...."

on a resolution and ordinance revoking temporary zoning variances either because they were biased and prejudiced and had determined in advance of the hearings and presentation of the evidence to vote for the revocation, based upon their campaign promises, or had not heard the evidence presented to the council. The resolution and ordinance in question resulted from granting numerous variances, including a parking lot variance at issue in the case, which inspired the voters to adopt an initiative revoking all variances. When enforcement of the initiative was enjoined, three of its proponents campaigned for the city council on a platform of revocation of the variances. In *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543, 537 P.2d 375 (1975), California's Supreme Court disapproved of the *Saks* holding on the grounds that the Court of Appeals decision in *Saks* effectively thwarted representative government by depriving the voters of the power to elect councilmen whose views on important issues of civic policy corresponded to those of the electorate. The Court stated that campaign statements by candidates for elected municipal office do not disqualify a candidate from voting on matters that come before them after his election, thus permitting the conclusion that *Saks* was erroneously decided and must be disapproved.

Although facts substantiating financial or personal gain or loss are not now at issue and did not prompt this Opinion, if such facts were at issue we advise that Nevada's Ethics in Government Law, NRS chapter 281, would be implicated. In particular, we note that statute's stated dual

purpose is to prevent a public officer from seeking or accepting any gift, service, favor, employment engagement, emolument or economic opportunity which would tend to improperly influence the public officer and to prevent a public officer from using his position to secure or grant unwarranted privileges, preferences, exemptions or advantages to himself, any business entity in which he has a significant pecuniary interest or any person to whom he has a commitment in a private capacity to the interests of that person. NRS 281.481. A commitment in a private capacity includes a commitment to a person who is a member of his household, who is related to him by blood, adoption or marriage within a certain degree of consanguinity or affinity, who employs him or a member of his household or with whom he has a substantial business relationship. NRS 281.501(8).

The Nevada Ethics in Government Law further provides that if a financial or personal detriment or benefit which accrues to a public official is not greater than that accruing to any other member of the general business, profession, occupation or group, the public official may vote upon the matter. NRS 281.501(1). The statute goes on to require that the disclosure of sufficient information concerning the financial or personal detriment or benefit at the time the matter is decided upon. NRS 281.501(4).

For the foregoing reasons, it is our Opinion that prior statements of position on an issue of public importance by either a candidate or by an elected official do not require disqualification of that individual at the time the individual is charged with deciding upon the issue. The only type of bias which may lead to disqualification of a public official must

be grounded in facts demonstrating that the public official stands to reap either financial or personal gain or loss as a result of official action. Although, once again, we are unaware of the existence of any such facts[3] with respect to any member of the City Council on any issue the City Council is expected to soon consider if you anticipate that certain positions you may have previously taken or personal relationships in which you are involved may give rise to allegations of bias against you, you should simply err on the side of caution and disclose sufficient information concerning the positions or relationships before you consider and vote on the issue. This disclosure should be articulated on the record. However, if no facts exist demonstrating personal or financial gain or loss, disclosure is unnecessary. If you have additional questions, comments or concerns regarding this matter, please feel free to contact this office.

cc: Chester H. Adams
City Attorney

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[3] *See footnote 1.*

AGO 98-27 ETHICS IN GOVERNMENT; PUBLIC OFFICIALS DISCLOSURE AND ABSTENTION: Abstention required when independence of judgment of reasonable person is materially affected by tangible interest of another.

Carson City, September 25, 1998

The Honorable Bradford R. Jerbic, Las Vegas City Attorney, 400 East Stewart, Las Vegas, Nevada 89101

Dear Mr. Jerbic:

You have presented your analysis and requested an opinion from this office in an attempt to provide some clarification to public officials who are members of boards and commissions as to when they would need to consider disclosing and abstaining from voting based upon ethical considerations.

QUESTION

When does a member of a board or commission need to disclose a possible conflict of interest and abstain from voting because of an acquaintance or friendship with a person interested in, but not a party to the outcome of an item before the governing body?

ANALYSIS

The requirements regarding disclosure and abstention in Nevada must be determined by analysis of Nevada's ethics in government laws as well as other relevant statutes, legislative history, opinions issued by the Commission on Ethics (Ethics Commission), and any applicable case precedent. As you know, these issues involve largely uncharted waters in our state due to the lack of relevant case

precedent available here or nationally to provide guidance. In the first instance, questions concerning ethical requirements should always be addressed to one's counsel.

In more difficult or complex matters, the next step is to consider seeking an advisory opinion from the Ethics Commission since that is the body vested by the Legislature with jurisdiction and responsibility to enforce the laws. The job of interpreting and enforcing the statutes is sometimes difficult in light of the often complex factual scenarios, which are presented to the Ethics Commission. As you have indicated the variety and breadth of questions has contributed to some growing confusion as to the applicability of the relevant statutes.

It is apparent from the increasing number of questions concerning these statutes that the Nevada Legislature will in all likelihood be asked to consider reviewing and refining the current laws so public officials will better understand and be able to comply with the rules. As you know, this office does not have authority to resolve these matters and can only address your question in an advisory capacity in the hope of assisting you and other lawyers who represent public bodies. Appeals from Ethics Commission rulings go to the district court in accordance with NRS 233B.130. The ultimate rulings and interpretations on these questions must come from the Ethics Commission, the courts and the Legislature.

In your request, you put forth the scenario of a personal friendship between a public officer and a person interested in, but not a party to the outcome of a matter upon which the public officer will be voting.

The friendship is a long standing one (the friend being a well-liked customer of the public officer in his private capacity), although the friends had not engaged in any social activities. The friend voiced his opposition to the matter to the public officer. The public officer consulted with counsel and disclosed the friendship on the record before voting on the matter. It is your conclusion that in such circumstances the public official's obligation was to disclose the matter, but that abstention was not required. This was the advice given by your office and followed by the public official. A question has now been raised as to whether the public officer should have abstained as well.

NRS 281.501(2) provides that a member of the legislative branch must abstain from a vote where he has a commitment in a private capacity to the interests of others "with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by" that private interest of others. This is the legal standard that governs whether a public officer must abstain from voting on a matter. "Member of the legislative branch" is defined under NRS 281.4355 to include legislators and members of boards of county commissioners, city councils or other political subdivisions. The requirement for disclosure set forth in NRS 281.501(3), prohibits public officers and employees from acting upon a matter unless they have disclosed the full nature and extent of any private interest which would reasonably affect their judgment. Also, NRS 281.481(2) provides, "[a] public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or

advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person." The language in these statutes is not clear and the terms are not specifically defined in NRS chapter 281 or in case precedent. In the absence of specific standards or definitions, the confusion you describe regarding the applicability of these statutes is understandable.

The Ethics Commission has articulated, in its recently issued opinion concerning the Clark County airport concessions at Terminal D, four considerations which it will use in its future analysis of the nature and impact of a public official's personal relationships. Nevada Commission on Ethics Opinion (NCOE) Nos. 97-54, 97-59, 97-66, 97-53, and 97-52, (Terminal D Opinion). You have indicated that these criteria do not give sufficient guidance to either public officials or their lawyers who on a regular basis must make decisions about whether to make disclosures and when to abstain from voting on matters. As noted above, there is very little legal precedent to assist in providing guidance.

Our representative form of government is based upon our elected officials being typical of the constituents who elected them. Frequent contact between elected officials and their constituents is necessary for elected officials to truly represent their communities and is almost a daily occurrence in Nevada's smaller communities. If elected officials do not communicate with their constituents, some of whom may be acquaintances and personal friends, the elected officials will not be as well informed. We do not believe that the ethics in government law was intended to prevent government officials from seeking or

receiving input from constituents who may also include acquaintances and friends. Rather, the law tries to strike a balance wherein public officials must disclose certain outside interests and in some cases abstain from voting where their independence of judgment is materially affected. The law places particular emphasis on the need for public officials to disclose conflicts or potential conflicts on the record, with abstention being required only in limited circumstances where the independence of judgment of a reasonable person would in fact be materially affected.

As stated above, the terms "materially affected by" or "commitment in a private capacity to the interests of others," are not specifically defined by the Legislature or the Ethics Commission in the Terminal D opinion. Although the four personal relationship criteria are helpful in the analysis, they do not precisely fix the point at which a "personal relationship" will be considered to *materially affect* the independence of judgment of a public official.

The criteria provide no guidance regarding the specific meaning of the term "interests of others." Does that term apply only to persons who are in fact impacted either directly or indirectly by the matter being voted upon by the public official? Or does this term mean simply that the other person has an opinion on the subject matter? Although NRS 281.501(2) contains some limiting language, these are questions which are not clearly answered and which have created a climate of some doubt and uncertainty.

Although the evaluation of ethical concerns is sometimes difficult and necessarily qualitative, public

officials, who consult with counsel to determine their obligations, should be able to carry out their public duties without concern that they may still be found to have acted inappropriately after the fact. As you know good faith reliance on advice of counsel after full disclosure of relevant facts can constitute a defense in criminal matters. *See, e.g., In the Matter of Vandelinde*, 366 S.E.2d 631, 637 (W.Va. App. 1988)(Defense of good faith reliance on advice of counsel can be established where there has been complete disclosure of facts and the advice given is not patently erroneous); *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968)(To assert the reliance defense, the defendant must establish good faith reliance on an expert coupled with full disclosure to the expert). A similar defense has been recognized in at least one published ethics decision involving an attorney. *See Committee on Legal Ethics of W. Va. State Bar v. Coleman*, 377 S.E.2d 485, 490, 500 (W.Va. App. 1988) (Good faith reliance on statutory interpretation was a defense to excessive fee allegation). Thus, the good faith reliance of a public official upon advice of counsel which has been rendered in a sincere attempt to help the public official comply with ethics provisions, we believe should be a defense in appropriate cases.

Nevada's ethics in government law recognizes consultation with counsel as a defense to the element of willfulness in ethics cases. NRS 281.551(6) provides:

> An action taken by a public officer or employee or former public officer or employee relating to NRS 281.481, 281.491, 281.501 or 281.505 is not a willful violation of a provision of those sections if the public officer or employee:

(a) Relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents or by the employer of the employer of the public employee;

(b) Was unable, through no fault of his own, to obtain an opinion from the commission before the action was taken; and

(c) Took action that was not contrary to a prior opinion issued by the commission to the public officer or employee.

This defense could be expanded to constitute a complete defense in appropriate cases as discussed above. Public officials who sincerely attempt to comply with the law by consulting with counsel, and completely disclose relevant facts to their counsel, and who receive and follow advice consistent with the ethics in government law should not be found in violation, even if there is some subsequent disagreement regarding the advice given. In such cases it may be more appropriate to give the public official instruction or direction for the future. A public officer's duty is defined in NRS 281.421, which provides:

1. It is hereby declared to be the public policy of this state that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.

2. The legislature finds that:

(a) The increasing complexity of state and local government more and more closely related to private life and enterprise enlarges the potentiality for conflict of interests.

(b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

NRS 281.421 creates an obligation on the part of the public officers to avoid conflicts between their private and public interests. To assist in assuring this, the Legislature, in NRS 281.501 as amended in 1997, set forth requirements as to when a commitment in a private capacity to the interests of others would require disclosure and even abstention. NRS 281.501, provides:

1. Except as otherwise provided in subsection 2 or 3, a member of the legislative branch may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.

2. In addition to the requirements of the code of ethical standards, a member of the legislative branch shall not vote upon or advocate the passage or failure of, but may otherwise participate in the

consideration of a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.

3. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest, without disclosing the full nature and extent of the gift, loan, commitment, or interest. Except as otherwise provided in subsection 6, such a

disclosure must be made at the time the matter is considered.

If the officer or employee is a member of a body that makes decisions, he shall make the disclosure in public to the chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected.

4. If a member of the legislative branch declares to the legislative body or committee in which the vote is to be taken that he will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

5. If a member of the legislative branch is voting on a matter which affects public employees, he shall make a full public disclosure of any personal pecuniary interest that he may have in the matter.

6. After a member of the legislative branch makes a disclosure pursuant to subsection 3, he may file with the director of the legislative counsel bureau a written statement of his disclosure. The written statement must designate the matter to which the disclosure applies. After a legislator files a written statement pursuant to this subsection, he is not required to disclose orally his interest when the

matter is further considered by the legislature or any committee thereof. A written statement of disclosure is a public record and must be made available for inspection by the public during the regular office hours of the legislative counsel bureau.

As long as the independence of judgment of a reasonable person would not be *materially affected* by a commitment in a private capacity to the interests of others, it appears a member of the legislative branch may vote. To determine whether the independence of judgment is materially affected by a commitment, the statute sets forth a presumption that the independence of judgment of a reasonable person would not be materially affected by his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed is not greater than that accruing to any other member of the general business, profession, occupation or group. Under this statute, public officials are presumed not to be materially affected by a private commitment, unless there is some tangible extra benefit or detriment derived by either party (the official or the private person). Thus, before a public official may be required to abstain, we believe there must be some evidence of a benefit or detriment, which is greater than that experienced by similarly situated persons. Even if a greater benefit or detriment exists, the statute still may not require abstention unless the independence of judgment of a reasonable person in that situation would be materially affected by this tangible interest.

At the time of the creation of NRS 281.501 in 1977, the Legislature defined a conflict of interest to be when a legislator received some monetary benefit outside his salary for performing his official duty. The Legislature indicated that it did not want to prevent input from constituents. A legislative body is made stronger as a result of the input that it receives from a variety of people. Overly restricting the voting ability of legislative bodies would defeat the purpose of having such lay legislative groups. One legislator stated, "[I] do not believe that a legislator should be precluded from . . .voting on legislation merely because it is something that may be desirable to a client. Ethics should deal with the problems where a legislator is financially rewarded because of introducing a measure that a client wanted." *Hearing on A.B. 450 Before the Senate Government Affairs and Assembly Elections Committee, 1977 Legislative Session*, 3 (March 28, 1977).

The statute was amended in 1991 to prohibit voting where a conflict of interest actually exists. The original law made abstention optional and in 1991 language was added to make abstention mandatory where a conflict of interest is found. However, in 1991 the Legislature also apparently sought to limit when abstention is actually required by adding a presumption that an official's independence of judgment is not materially affected where a pecuniary benefit or detriment exists if the benefit or detriment is the same as that experienced by others similarly situated.

The then Chairman of the Ethics Commission offered the following advice:

> Obviously, it is a question of degree and the particular circumstances. One should not have to abstain from voting simply for being personally representative of or in the same circumstances as one's constituents. That may be a reason why one is elected in the first place. That is in the very nature of a "Citizen Legislature."
>
> However, where the circumstances change to such a degree that independence of judgment *is* in fact so materially affected or impaired, one should be required to abstain from voting even though the benefit or detriment accruing to him or her is the same.

Hearing on A.B. 190 Before the Senate Committee on Government Affairs, 1991 Legislative Session, Exhibit 1 (May 8, 1991).

In 1997, NRS 281.501(2) of the statute was further amended to expand the presumption against the existence of a conflict to include the situation where an official may have a commitment in a private capacity to the interests of others. In other words, there is a presumption against finding a conflict where a public official has a commitment to the private interests of others, if the resulting benefit or detriment is the same as others similarly situated.

Language broadening the abstention requirement could have been added, but the Legislature instead chose to narrow the abstention requirement. Expansion of abstention requirements can only be achieved through legislative action. Under the current statutory language of NRS 281.501 discussed above, if on an objective level it appears that a

reasonable person would not be able to separate himself from the tangible interest of another, such that his independence of judgment is materially affected, then he should abstain.

As discussed above, the Ethics Commission's evaluation of the impact of personal relationships on the independent judgment of public officials is most recently found in the Terminal D Opinion. In seeking to qualitatively adjudge such relationships, the Ethics Commission interpreted NRS 281.501 to require a look at the substance of the relationship itself, rather than the label on it. In doing this, the Ethics Commission came up with four factors to analyze a personal relationships for conflict of interest purposes. These factors are: 1) the length of a relationship, 2) the context of the relationship, 3) the substance of the relationship, and 4) the frequency of the relationship. Recognizing these personal relationships are difficult to adjudge, the Ethics Commission stated, "By legislative design, the determination of whether a given relationship would materially affect the independence of judgment of a reasonable person will always be a case-by-case examination." Terminal D Opinion, at 13.

Summarizing the Terminal D Opinion, significant personal relationships that required disclosure and abstention, were found under the following circumstances:

> (1) where one is considered a "best friend" in which the friendship is forged in the context of common political and philosophical beliefs that both parties felt strongly enough about to become politically active on behalf of;

(2) a "long-term very close friend with the spouse of the public officer" where the public officer knows little information about this person or the other applicants, yet votes for the friend of his spouse's matter in front of the public body;

(3) a "long-term business relationship where reliance and trust have been such large factors that many facets of their lives intersect in their relationship," and finally

(4) where there were "substantial efforts to support the public officer's candidacy as evidenced by raising large amounts of money for the public officer combined with events such as the official's daughter participating in the friend's wedding" that the relationship has become a political alliance in which both were dedicated to common causes, one of which was the furtherance of the public officer's political aspirations which in turn made the public officer beholden to her friend.

In each of these situations, the "friend" was directly interested in and significantly benefited from the matter being voted upon by the public official. The Ethics Commission found that the public officials had violated NRS 281.501(2) and (3), and NRS 281.481(2). This is quite different from the situation that you have outlined where the "friend" is not before the public body, but has privately expressed a strong opinion to the public official.

Although the close and long-term friendships at issue in the Terminal D matter required disclosure and abstention, under the analysis in the opinion it would be

reasonable to conclude that abstention would only be required where the other party to the friendship is actually before the public body or benefits from the particular vote. It does not follow that the comments of a friend who is not personally impacted by the vote would require disclosure and abstention. We agree with your suggestion that the legislative process could be entirely undermined if a member of a public body is required to abstain from a vote because he has an acquaintance or friendship with someone interested in a matter, but not actually affected (receiving a benefit or detriment greater than others) by the vote on the particular matter. If the Legislature intended otherwise, it would have expressed that intent in the language of NRS 281.501, which has been amended four times since its enactment. We can derive from the current NRS 281.501, the 1991 and 1997 amendments, and from the opinions of the Ethics Commission, that the law does not place a blanket prohibition on voting where an acquaintance or friendship exists. Only in circumstances, where it appears from objective evidence that as a result of the acquaintance or friendship, a reasonable person in the public officer's situation would have no choice but to be beholden to someone who has an actual interest in the matter, is abstention required. In such circumstances, the public official's independence of judgment would be materially affected.

According to other Ethics Commission opinions, a public officer was not required to abstain from a vote on a contract amendment and renewal matter which involved a friendship and business relationship with the person who came before the board because the matter before the board did not involve actually choosing the

candidate to be awarded the contract. NCOE Opinions 94-27, 94-30. In addition, an arms-length business relationship with one before the public body, such as a private business loan in the amount of $200,000, does require disclosure but not abstention unless the relationship materially affects the independence of judgment of the public officer. NCOE Opinion 94-05. Finally, when a public officer considers a matter that is only tenuously related to a previous matter which required disclosure and abstention, the public officer may vote (the public body was deciding whether or not to seek review of a court decision). *Board of Commissioners of the City of Las Vegas, Nevada v Dayton Development Company*, 91 Nev. 71, 530 P.2d 1187 (1975).

Under Nevada's law, public officers have a responsibility to consider whether their private interests conflict with a public matter. Thus, whenever a public officer has reasonable notice a friend (or other private interest) may be involved in a matter on which they will be voting, the disclosure and/or abstention requirements must be taken into consideration. However, in this regard, the Ethics Commission has stated in the Terminal D Opinion:

> In the future, deliberate ignorance of readily knowable facts will not be condoned by this Commission. We insist each public official vigilantly search for reasonably ascertainable potential conflicts of interest. The solution for a public official who knows that her best friend may end up appearing before her, or who is overwhelmed with the volume of her workload, is to task her staff with assisting her to root out potential ethical concerns.

Terminal D Opinion at 16. Thus, if a public officer knows his friend has a matter coming before the public body, the official clearly has an obligation to consider the relevant circumstances, disclose and abstain if the official's independence of judgment would be materially affected by the friendship. Public officials should always consult with counsel on these matters, and as noted in the Terminal D opinion, should never deliberately try to remain ignorant of potential conflicts.

However, we are concerned that this portion of the Terminal D opinion seems to suggest that staff should be tasked with conducting research if the public official is too busy to review agendas for potential conflicts. This language, as well as the reference to "conflict software" implies that all public bodies should have staff available to conduct research into all possible conflicts, and that public funds should be expended to obtain conflict software and any necessary hardware. Public bodies may not have budgeted for such software and hardware. This suggestion also raises some concern about the propriety of using public resources to research the private interests of officials and others.

CONCLUSION

The Legislature should revisit these very complex and difficult issues to consider clearer guidance to all public officials. Although ultimately judicial interpretation of the relevant statutes may provide more definitive guidance on these matters. We recognize that the Ethics Commission's job of interpreting and enforcing the statutes is difficult in light of the often complex factual scenarios which are presented, and that through its decisions and

regulation drafting authority, the Commission continuously seeks to clarify the responsibilities of public officials under Nevada's ethics in government laws.

The ethics in government law is intended to prevent public officials from acting out of self-interest or from using their office to give unfair advantage to others. As the former chair of the Ethics Commission stated, "where the circumstances change to such a degree that independence of judgment *is in fact so materially affected or impaired*, one should be required to abstain from voting . . ." (emphasis added). Under NRS 281.501, and in light of the interpretation of this statute as articulated to the Legislature by the former chair of the Ethics Commission, abstention is only required where there exists objective evidence that a reasonable person in the public official's situation would have his or her independence of judgment materially affected by a commitment in a private capacity to the tangible interests of others. Public officials should always disclose any relevant private interests on the record and with the advice of counsel explore whether such an interest would require abstention. If it is determined that the independence of judgment would not be materially affected and/or that the friend or acquaintance has no tangible interest in the particular matter, the basis for such conclusions should be carefully articulated on the record.

In light of the variety and breadth of questions that have been recently raised, we believe all public entities and their counsel would be well advised to carefully review and reconsider the procedures used to evaluate contracts or other matters requiring a

public vote. Consultation with ethics experts such as the Josephson Institute in Los Angeles or others may also be helpful. Bidding and bid protest procedures from similarly situated public entities, as well as national or state organizations which provide training in this regard, should be considered as well. *See MCM Construction, Inc. v. City & County of San Francisco, et al*, 66 Cal. App. 4th 359 (Cal. App. 1998) (Detailed discussion of airport bid and bid protest procedures). Although our comments can only be treated as advisory, they will hopefully assist you and other lawyers in advising clients.

FRANKIE SUE DEL PAPA

Attorney General

CAMPAIGN CONTRIBUTIONS AND EXPENSES REPORT **State of Nevada**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

3393 ALPLAND LANE SPARKS, NV — 626-6509
Mailing Address (include city and zip code) — Telephone No.

WWCARRIGAN@AOL.COM
E-Mail Address

Select Appropriate Box(es) ☒ CANDIDATE ☐ PAC ☐ BAG ☐ POL PRTY ☐ IND EXP ☐ NONPROFIT CORP ☐ AMENDED ☐ ANNUAL FILING ☐ PETITIONERS WHO INITIATE/CIRCULATE PETITION & RECEIVE OR EXPEND FUNDS IN EXCESS OF 10K

☐ Annual Filing – Due January 15, 2006
Period: January 1, 2005 – December 31, 2005

☒ Report #1 Due – August 8, 2006*
Period: Jan. 1, 2006 – Aug. 3, 2006

☐ Report #2 Due – October 31, 2006*
Period: Aug. 4, 2006 – Oct. 26, 2006

☐ Report #3 Due – January 15, 2007 */**
Period: Jan. 1, 2006 – Aug. 3, 2006

☐ Annual Filing – Due January 15, 2007
Period: January 1, 2006 – December 31, 2006

FOR OFFICE USE ONLY

* These Reports are filed by incumbents/candidates running for office in the 2006 election cycle

**Third Report suffices for 2007 Annual filing if candidate also filed Report Nos. 1 and 2

CONTRIBUTIONS SUMMARY	**This Period**	**Cumulative From Beginning of Report Period #1 through end of This Reporting Period**
1. Total Monetary Contributions Received in Excess of $100 (See page 1 of instruction sheet)	$25900	$25900
2. Total Monetary Contributions Received of $100 or Less (See page 2 of instruction sheet)	$1125	$1125
3. Total Monetary Contributions in the form of loans guaranteed by a third party (See page 2 of instruction sheet)	0	0
4. Total Monetary Contributions in the form of loans that were forgiven (See page 2 of instruction sheet)	0	0
5. Total Amount of Monetary Contributions Received (Add Lines 1 through 4) (See page 2 of instruction sheet)	$27025	$27025

	This Period	Cumulative From Beginning of Report Period #1 through end of This Reporting Period
6. Total Amount of Written Commitments for Contributions (When commitment is funded report as contribution (monetary or in kind)	0	0
7. Total Value of In Kind Contributions Received in Excess of $100 (See page 2 of instruction sheet)	$825	$825

EXPENSES SUMMARY

8. Total Monetary Expenses Paid in Excess of $100 (See page 2 of instruction sheet)	$11796	$11796
9. Total Monetary Expenses Paid of $100 or Less (See page 2 of instruction sheet)	$134	$134
10. Total Amount of All Monetary Expenses Paid (Add Lines 8 and 9) (See page 2 of instruction sheet)	$11930	$11930
11. Total Value of In Kind Expenses in Excess of $100 (See page 3 of instruction sheet)	0	0
12. Disposition of Unspent Contributions (Only reported on Report #3, Annual Report or 15th day of the second month after candidates defeat or incumbent does not run for reelection) (See page 3 of instruction sheet)		CITY OF SPARKS OFFICE OF THE CITY CLERK AUG 08 2006

AFFIRMATION

I Declare Under Penalty of Perjury That the Foregoing is True and Correct

/s/ Mike Carrigan — 8-7-06

Signature — Date

CAMPAIGN CONTRIBUTIONS **Report Period #1**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Contributions in Excess of $100 or, When Added Together from
One Contributor Exceeds $100
Transfer Total Amount of All Campaign Contributions to Line 1 of Contributions Summary

CONTRIBUTOR'S NAME AND ADDRESS	DATE OF EACH CONTRI-BUTION	AMOUNT OF EACH CONTRI-BUTION	CHECK HERE IF LOAN	NAME AND ADDRESS OF 3RD PARTY IF LOAN GUARANTEED BY 3RD PARTY	NAME AND ADDRESS OF PERSON WHO FORGAVE THE LOAN, IF DIFFERENT THAN CONTRIBUTOR
SEE ATTACHED					

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	Name	Address	Date	Amount
1.	Gary Chetelat	401 Ringe Rd. Severn, MD	03/01/2006	$250
2.	Lewis Investment Co	1380 Greg St, Sparks, NV	03/01/2006	$2000
3.	RHE Trust	PO Box 2578, Reno, NV	05/20/06	$750
4.	Pick n' Pull	2205 Larkin Circle, Sparks, NV	06/01/06	$200
5.	AGC/PAC	PO Box 10291, Reno, NV	06/08/06	$750
6.	Ryten Properties	16062 Woodbridge Ct., Truckee, CA	06/13/06	$750
7.	Kiley Ranch Communities	201 W. Liberty St., Reno, NV	06/13/06	$750
8.	Lewis and Roca	3393 Howard Hughes, Las Vegas, NV	06/13/06	$500
9.	Comm. To Retain Chet Adams	PO Box 536, Sparks, NV	06/19/06	$200
10.	GMB Realty	5405 Mae Anne Ave., Reno, NV	06/19/06	$500
11.	Western Nevada Supply	PO Box 1576, Sparks, NV	06/20/06	$500
12.	Q&D Construction	1050 21st St., Sparks, NV	06/21/06	$500
13.	Frank Caffaratti	3100 Truckee Lane, Sparks, NV	06/27/06	$200
14.	Edna Etherton	1109 Harbor Cove Ct., Sparks, NV	06/27/06	$950
15.	Stonefield	355 Boxington Wy, Sparks, NV	06/28/06	$300
16.	CFA	1150 Corporate Blvd., Reno, NV	06/29/06	$500
17.	Olsen & Assoc.	330 Liberty St., Reno, NV	06/29/06	$500
18.	Solaegui Engineers	715 H St., Sparks, Nv	06/30/06	$300
19.	RAN	1007 Nevada St., Carson City, NV	06/30/06	$500
20.	Tropical Car Wash	7690 Deep Bay Dr., Reno, NV	07/05/06	$1000
21.	Reno/Sparks Realtors	PO Box 70969, Reno, NV	07/07/06	$2500
22.	RCM	5580 Mill St., Reno, NV	07/12/06	$250
23.	Lifestyle Homes	PO Box 7548, Reno, NV	07/13/06	$2500

24.	Dean Foods	3114 South Haskell, Dallas, TX	07/20/05	$500
25.	Sparks McCarran LLC	PO Box 2888, Del Mar, CA	07/20/06	$250
26.	D'Andrea Marketplace	PO Box 2888, Del Mar, CA	07/20/05	$250
27.	Jesse Haw	144 Greenridge Dr., Reno, NV	07/25/06	$250
28.	Somersett Llc	PO Box 34360, Reno, NV	07/25/06	$1000
29.	Pacific West Service	8700 Technology Way, Reno, NV	07/25/08	$500
30.	Northern Nevada Pac	1400 Wedekind Rd., Reno, NV	07/25/06	$5000
31.	Jeff Codega Planning	433 W. Plumb Lane, Reno, NV	07/25/06	$250
32.	SWC of Carpenters	501 N. Lamb Blvd, Las Vegas, NV	08/03/06	$250
33.	Washoe Building Supply	1479 Hymer Ave., Sparks, NV	08/07/06	$500

WRITTEN COMMITMENTS **Report Period #1**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Written Commitments in Excess of $100 or, When Added Together from One Entity Exceeds $100

Transfer Total Amount of All Written Commitments to Line 6 of Contributions Summary

NAME AND ADDRESS OF PERSON WHO MADE THE COMMITMENT	DATE OF EACH COMMITMENT	AMOUNT OF EACH COMMITMENT
	N/A	

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Name (print) Office (if applicable) District (if applicable)

Expense Categories

CATEGORIES	CODE
Office expenses	A
Expenses related to volunteers	B
Expenses related to travel	C
Expenses related to advertising	D
Expenses related to paid staff	E
Expenses related to consultants	F
Expenses related to polling	G
Expenses related to special events	H
**Goods and services provided in kind for which money would otherwise have been paid	I
Other miscellaneous expenses	J

**NRS 294A.362 requires "In Kind" contributions and expenses to be reported on a separate form, which is attached.

CAMPAIGN EXPENSES **Report Period #1**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Expenses in Excess of $100
Transfer Total Amount of All Campaign Expenses to Line 8 of Expenses Summary

NAME AND ADDRESS OF PERSON, GROUP OR ORGANIZATION WHO RECEIVED THE PAYMENT FOR THE EXPENSE(S)	CATEGORY (See Previous Page) NRS 294A 365	DATE OF EACH EXPENSE	AMOUNT OF EACH EXPENSE
ART ASSOCIATES 5476 RENO CORPORATE DR RENO, NV 89511	D	5-18-06	$4030
ART ASSOCIATES	D	5-25-06	$1100
FAST SIGNS RENO NV	D	6-13-06	$97
ART ASSOCIATES	D	7-13-06	$2080
ART ASSOCIATES	D	7-26-06	$3149
U.S. POSTAL SERVICE	D	7-26-06	$1437
HOME DEPOT SPARKS NV	D	7-27-06	$37

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IN KIND CONTRIBUTION IS DEFINED AS THE VALUE OF SERVICES PROVIDED IN KIND FOR WHICH MONEY WOULD HAVE OTHERWISE BEEN PAID.

In kind contributions and expenses include: paid polling and resulting data, paid direct mail, paid solicitation by telephone, any paid paraphernalia that was printed or otherwise produced to promote a campaign and the use of paid personnel to assist in a campaign. An in kind contribution may also include but is not limited to goods and services such as billboards, office space, printing, food and beverage and yard signs.

The donor of in kind contributions shall furnish to the recipient (candidate or other person), a written statement setting forth the actual cost of those services or the fair market value with 30 days after the time he furnishes those services. (NAC 294A.43)

Examples of in kind contributions: *(1) A person contributes billboard space and does not charge the candidate. The candidate would report the fair market value or actual cost of the billboard space as an in kind contribution; (2) A person pays for the printing cost of political signs for a candidate. The candidate would report the actual cost or fair market value of printing the signs as an in kind contribution.*

Example of in kind expenses: *(1) A person contributes the use of a large room to a candidate as an in kind contribution. Once the candidate utilizes the room it becomes an in kind expense to be reported.*

IN KIND CAMPAIGN CONTRIBUTIONS **Report Period #1**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

IN KIND

Contributions in Excess of $100 or, When Added Together from
One Contributor Exceeds $100
Transfer Total Value of All In-Kind Campaign Contributions to Line 7 of Contributions Summary

CONTRIBUTOR'S NAME AND ADDRESS	DATE OF EACH IN-KIND CONTRIBUTION	DESCRIPTION OF EACH IN-KIND CONTRIBUTION	VALUE OR COST OF EACH IN-KIND CONTRIBUTION COMMITMENT	CHECK HERE IF LOAN	NAME AND ADDRESS OF 3RD PARTY IF LOAN GUARANTEED BY 3RD PARTY	NAME AND ADDRESS OF PERSON WHO FORGAVE THE LOAN
ART ASSOC. RENO NV	7-13-06	GRAPHIC ARTIST COMPUTER PRODUCTION	$825			

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IN KIND WRITTEN COMMITMENTS **Report Period #1**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

In-Kind Written Commitments in Excess of $100 or, When Added Together from One Entity Exceeds $100

Transfer Total Amount of All Written Commitments to Line 6 of Contributions Summary

NAME AND ADDRESS OF PERSON WHO MADE THE IN-KIND COMMITMENT	DATE OF EACH IN-KIND COMMITMENT	AMOUNT OF EACH IN-KIND COMMITMENT
	N/A	

This page may be copied or duplicated if additional space is needed.

IN KIND CAMPAIGN EXPENSES **Report Period #1**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

IN KIND

Expenses in Excess of $100

Transfer Total Value of All In-Kind Campaign Expenses to Line 11 of Expenses Summary

NAME AND ADDRESS OF PERSON, GROUP OR ORGANIZATION WHO RECEIVED THE IN KIND GOOD(S) OR SERVICE(S)	DESCRIPTION OF EACH IN KIND EXPENSE	DATE OF EACH IN KIND EXPENSE	VALUE OR COST OF EACH IN KIND EXPENSE
	N/A		

This page may be copied or duplicated if additional space is needed.

CAMPAIGN CONTRIBUTIONS AND EXPENSES REPORT **State of Nevada**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)
3393 ALPLAND LANE, SPARKS, NV		626-6509
Mailing Address (include city and zip code)		Telephone No.
WWCARRIGAN@AOL.COM		
E-Mail Address		

Select Appropriate Box(es) ☒ CANDIDATE ☐ PAC ☐ BAG ☐ POL PRTY ☐ IND EXP ☐ NONPROFIT CORP ☐ AMENDED ☐ ANNUAL FILING ☐ PETITIONERS WHO INITIATE/CIRCULATE PETITION & RECEIVE OR EXPEND FUNDS IN EXCESS OF 10K

☐ Annual Filing – Due January 15, 2006
Period: January 1, 2005 – December 31, 2005

☐ Report #1 Due – August 8, 2006*
Period: Jan. 1, 2006 – Aug. 3, 2006

☒ Report #2 Due – October 31, 2006*
Period: Aug. 4, 2006 – Oct. 26, 2006

☐ Report #3 Due – January 15, 2007 */**
Period: Jan. 1, 2006 – Aug. 3, 2006

☐ Annual Filing – Due January 15, 2007
Period: January 1, 2006 – December 31, 2006

CITY OF SPARKS
OFFICE OF THE
CITY CLERK

OCT 31 2006

FOR OFFICE USE
ONLY

* These Reports are filed by incumbents/candidates running for office in the 2006 election cycle

**Third Report suffices for 2007 Annual filing if candidate also filed Report Nos. 1 and 2

CONTRIBUTIONS SUMMARY	**This Period**	**Cumulative From Beginning of Report Period #1 through end of This Reporting Period**
1. Total Monetary Contributions Received in Excess of $100 (See page 1 of instruction sheet)	$21000	$46900
2. Total Monetary Contributions Received of $100 or Less (See page 2 of instruction sheet)	$375	$1500
3. Total Monetary Contributions in the form of loans guaranteed by a third party (See page 2 of instruction sheet)	0	0
4. Total Monetary Contributions in the form of loans that were forgiven (See page 2 of instruction sheet)	0	0
5. Total Amount of Monetary Contributions Received (Add Lines 1 through 4) (See page 2 of instruction sheet)	$21375	$48400

	This Period	Cumulative From Beginning of Report Period #1 through end of This Reporting Period
6. Total Amount of Written Commitments for Contributions (When commitment is funded report as contribution (monetary or in kind)	0	
7. Total Value of In Kind Contributions Received in Excess of $100 (See page 2 of instruction sheet)	$0	

EXPENSES SUMMARY

8. Total Monetary Expenses Paid in Excess of $100 (See page 2 of instruction sheet)	$40406	$52202
9. Total Monetary Expenses Paid of $100 or Less (See page 2 of instruction sheet)	$0	$134
10. Total Amount of All Monetary Expenses Paid (Add Lines 8 and 9) (See page 2 of instruction sheet)	$40406	$52336
11. Total Value of In Kind Expenses in Excess of $100 (See page 3 of instruction sheet)	0	0
12. Disposition of Unspent Contributions (Only reported on Report #3, Annual Report or 15th day of the second month after candidates defeat or incumbent does not run for reelection) (See page 3 of instruction sheet)		

AFFIRMATION

I Declare Under Penalty of Perjury That the Foregoing is True and Correct

/s/ Mike Carrigan — 10-30-06

Signature — Date

CAMPAIGN CONTRIBUTIONS **Report Period #2**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Contributions in Excess of $100 or, When Added Together from
One Contributor Exceeds $100
Transfer Total Amount of All Campaign Contributions to Line 1 of Contributions Summary

CONTRIBUTOR'S NAME AND ADDRESS	DATE OF EACH CONTRI-BUTION	AMOUNT OF EACH CONTRI-BUTION	CHECK HERE IF LOAN	NAME AND ADDRESS OF 3RD PARTY IF LOAN GUARANTEED BY 3RD PARTY	NAME AND ADDRESS OF PERSON WHO FORGAVE THE LOAN, IF DIFFERENT THAN CONTRIBUTOR
See attached					

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	Name	Address	Date	Amount
1.	Olympia Land Corp.	Las Vegas, NV	8/29/06	$2500
2.	Longley Town Center	9460 Double R, Reno, NV	9/02/06	$1575
3.	SPPC	6100 Neil Road, Reno, NV	9/02/06	$250
4.	South Meadows Prop	6420 Corporate, Reno, NV	9/10/06	$2325
5.	Richard Hodges	6410 Zermatt Ct., Reno, NV	9/12/06	$5000
6.	SW Regional Carpenters	501 Lamb, Las Vegas, NV	9/20/06	$250
7.	Tanamera LLC	5470 Corporate, Reno, NV	9/22/06	$1100
8.	Nevada Land Co.	3480 Richards, Carson City	10/04/06	$500
9.	Vidler Water Co	3480 Richards, Carson City	10/04/06	$500
10.	Lewis Investment Co	1380 Greg Street, Sparks, NV	10/20/06	$2000
11.	Peppermill Casino	90 W. Grove St., Reno, NV	10/25/06	$5000

WRITTEN COMMITMENTS **Report Period #2**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Written Commitments in Excess of $100 or, When Added Together from One Entity Exceeds $100

Transfer Total Amount of All Written Commitments to Line 6 of Contributions Summary

NAME AND ADDRESS OF PERSON WHO MADE THE COMMITMENT	DATE OF EACH COMMITMENT	AMOUNT OF EACH COMMITMENT
	N/A	

This page may be copied or duplicated if additional space is needed.

CAMPAIGN EXPENSES **Report Period #2**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Expense Categories

CATEGORIES	CODE
Office expenses	A
Expenses related to volunteers	B
Expenses related to travel	C
Expenses related to advertising	D
Expenses related to paid staff	E
Expenses related to consultants	F
Expenses related to polling	G
Expenses related to special events	H
**Goods and services provided in kind for which money would otherwise have been paid	I
Other miscellaneous expenses	J

**NRS 294A.362 requires "In Kind" contributions and expenses to be reported on a separate form, which is attached.

CAMPAIGN EXPENSES **Report Period #2**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Expenses in Excess of $100
Transfer Total Amount of All Campaign Expenses to Line 8 of Expenses Summary

NAME AND ADDRESS OF PERSON, GROUP OR ORGANIZATION WHO RECEIVED THE PAYMENT FOR THE EXPENSE(S)	CATEGORY (SEE PREVIOUS PAGE) NRS 294A 365	DATE OF EACH EXPENSE	AMOUNT OF EACH EXPENSE
ART ASSOCIATES 5476 RENO CORPORATE DR RENO NV 89511	D	8-4-06	$2687
USPS	D	8-4-06	$1435
ART ASSOCIATES	D	8-11-06	$255
ART ASSOCIATES	D	10-03-06	$1960
ART ASSOCIATES	D	10-03-06	$14894
ART ASSOCIATES	D	10-06-06	$2035
ART ASSOCIATES	D	10-06-06	$524
ART ASSOCIATES	D	10-10-06	$400
ART ASSOCIATES	D	10-12-06	$3875
USPS	D	10-19-06	$2768
ART ASSOCIATES	D	10-19-06	$3335
ART ASSOCIATES	D	10-25-06	$6238

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IN KIND CONTRIBUTIONS AND EXPENSES REPORT

IN KIND CONTRIBUTION IS DEFINED AS THE VALUE OF SERVICES PROVIDED IN KIND FOR WHICH MONEY WOULD HAVE OTHERWISE BEEN PAID.

In kind contributions and expenses include: paid polling and resulting data, paid direct mail, paid solicitation by telephone, any paid paraphernalia that was printed or otherwise produced to promote a campaign and the use of paid personnel to assist in a campaign. An in kind contribution may also include but is not limited to goods and services such as billboards, office space, printing, food and beverage and yard signs.

The donor of in kind contributions shall furnish to the recipient (candidate or other person), a written statement setting forth the actual cost of those services or the fair market value with 30 days after the time he furnishes those services. (NAC 294A.43)

Examples of in kind contributions: *(1) A person contributes billboard space and does not charge the candidate. The candidate would report the fair market value or actual cost of the billboard space as an in kind contribution; (2) A person pays for the printing cost of political signs for a candidate. The candidate would report the actual cost or fair market value of printing the signs as an in kind contribution.*

Example of in kind expenses: *(1) A person contributes the use of a large room to a candidate as an in kind contribution. Once the candidate utilizes the room it becomes an in kind expense to be reported.*

IN KIND CAMPAIGN CONTRIBUTIONS **Report Period #2**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

IN KIND

Contributions in Excess of $100 or, When Added Together from
One Contributor Exceeds $100
Transfer Total Value of All In-Kind Campaign Contributions to Line 7 of Contributions Summary

CONTRIBUTOR'S NAME AND ADDRESS	DATE OF EACH IN-KIND CONTRIBUTION	DESCRIPTION OF EACH IN-KIND CONTRIBUTION	VALUE OR COST OF EACH IN-KIND CONTRIBUTION COMMITMENT	CHECK HERE IF LOAN	NAME AND ADDRESS OF 3RD PARTY IF LOAN GUARANTEED BY 3RD PARTY	NAME AND ADDRESS OF PERSON WHO FORGAVE THE LOAN
			N/A			

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IN KIND WRITTEN COMMITMENTS **Report Period #2**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

In-Kind Written Commitments in Excess of $100 or, When Added Together from One Entity Exceeds $100

Transfer Total Amount of All Written Commitments to Line 6 of Contributions Summary

NAME AND ADDRESS OF PERSON WHO MADE THE IN-KIND COMMITMENT	DATE OF EACH IN-KIND COMMITMENT	AMOUNT OF EACH IN-KIND COMMITMENT
	N/A	

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IN KIND CAMPAIGN EXPENSES **Report Period #2**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

IN KIND

Expenses in Excess of $100
Transfer Total Value of All In-Kind Campaign Expenses to Line 11 of Expenses Summary

NAME AND ADDRESS OF PERSON, GROUP OR ORGANIZATION WHO RECEIVED THE IN KIND GOOD(S) OR SERVICE(S)	DESCRIPTION OF EACH IN KIND EXPENSE	DATE OF EACH IN KIND EXPENSE	VALUE OR COST OF EACH IN KIND EXPENSE
	N/A		

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CAMPAIGN CONTRIBUTIONS AND EXPENSES REPORT **State of Nevada**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)
3393 ALPLAND LANE SPARKS NV		626-6509
Mailing Address (include city and zip code)		Telephone No.

WWCARRIGAN@AOL.COM
E-Mail Address

Select Appropriate Box(es) ☒ CANDIDATE ☐ PAC ☐ BAG ☐ POL PRTY ☐ IND EXP ☐ NONPROFIT CORP ☐ AMENDED ☐ ANNUAL FILING ☐ PETITIONERS WHO INITIATE/CIRCULATE PETITION & RECEIVE OR EXPEND FUNDS IN EXCESS OF 10K

☐ Annual Filing – Due January 15, 2006
Period: January 1, 2005 – December 31, 2005

☐ Report #1 Due – August 8, 2006*
Period: Jan. 1, 2006 – Aug. 3, 2006

☐ Report #2 Due – October 31, 2006*
Period: Aug. 4, 2006 – Oct. 26, 2006

☒ Report #3 Due – January 15, 2007 */**
Period: Jan. 1, 2006 – Aug. 3, 2006

☐ Annual Filing – Due January 15, 2007
Period: January 1, 2006 – December 31, 2006

CITY OF SPARKS
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CITY CLERK

JAN 11 2007

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* These Reports are filed by incumbents/candidates running for office in the 2006 election cycle

**Third Report suffices for 2007 Annual filing if candidate also filed Report Nos. 1 and 2

CONTRIBUTIONS SUMMARY	**This Period**	**Cumulative From Beginning of Report Period #1 through end of This Reporting Period**
1. Total Monetary Contributions Received in Excess of $100 (See page 1 of instruction sheet)	$1000	$47900
2. Total Monetary Contributions Received of $100 or Less (See page 2 of instruction sheet)	0	$1500
3. Total Monetary Contributions in the form of loans guaranteed by a third party (See page 2 of instruction sheet)	0	0
4. Total Monetary Contributions in the form of loans that were forgiven (See page 2 of instruction sheet)	0	0
5. Total Amount of Monetary Contributions Received (Add Lines 1 through 4) (See page 2 of instruction sheet)	$1000	$49400

	This Period	Cumulative From Beginning of Report Period #1 through end of This Reporting Period
6. Total Amount of Written Commitments for Contributions (When commitment is funded report as contribution (monetary or in kind)	0	0
7. Total Value of In Kind Contributions Received in Excess of $100 (See page 2 of instruction sheet)	$9000	$9825

EXPENSES SUMMARY

8. Total Monetary Expenses Paid in Excess of $100 (See page 2 of instruction sheet)	0	$52202
9. Total Monetary Expenses Paid of $100 or Less (See page 2 of instruction sheet)	0	$134
10. Total Amount of All Monetary Expenses Paid (Add Lines 8 and 9) (See page 2 of instruction sheet)	0	$52336
11. Total Value of In Kind Expenses in Excess of $100 (See page 3 of instruction sheet)	0	0
12. Disposition of Unspent Contributions (Only reported on Report #3, Annual Report or 15th day of the second month after candidates defeat or incumbent does not run for reelection) (See page 3 of instruction sheet)		$1494

AFFIRMATION

I Declare Under Penalty of Perjury That the Foregoing is True and Correct

/s/ Mike Carrigan — 1-10-07

Signature — Date

CAMPAIGN CONTRIBUTIONS **Report Period #3**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Contributions in Excess of $100 or, When Added Together from One Contributor Exceeds $100
Transfer Total Amount of All Campaign Contributions to Line 1 of Contributions Summary

CONTRIBUTOR'S NAME AND ADDRESS	DATE OF EACH CONTRI-BUTION	AMOUNT OF EACH CONTRI-BUTION	CHECK HERE IF LOAN	NAME AND ADDRESS OF 3RD PARTY IF LOAN GUARANTEED BY 3RD PARTY	NAME AND ADDRESS OF PERSON WHO FORGAVE THE LOAN, IF DIFFERENT THAN CONTRIBUTOR
RYTEN PROP 16062 WOODBRIDGE TRUCKEE, CA	11-13-06	$500			
CHARTER COMM ST LOUIS, MO	12-06-06	$500			

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WRITTEN COMMITMENTS **Report Period #3**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Contributions in Excess of $100 or, When Added Together from
One Contributor Exceeds $100
Transfer Total Amount of All Campaign Contributions to Line 1 of Contributions Summary

NAME AND ADDRESS OF PERSON WHO MADE THE COMMITMENT	DATE OF EACH COMMITMENT	AMOUNT OF EACH COMMITMENT
	N/A	

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CAMPAIGN EXPENSES **Report Period #3**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Expense Categories

CATEGORIES	CODE
Office expenses	A
Expenses related to volunteers	B
Expenses related to travel	C
Expenses related to advertising	D
Expenses related to paid staff	E
Expenses related to consultants	F
Expenses related to polling	G
Expenses related to special events	H
**Goods and services provided in kind for which money would otherwise have been paid	I
Other miscellaneous expenses	J

**NRS 294A.362 requires "In Kind" contributions and expenses to be reported on a separate form, which is attached.

CAMPAIGN EXPENSES **Report Period #3**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

Expenses in Excess of $100
Transfer Total Amount of All Campaign Expenses to Line 8 of Expenses Summary

NAME AND ADDRESS OF PERSON, GROUP OR ORGANIZATION WHO RECEIVED THE PAYMENT FOR THE EXPENSE(S)	CATEGORY (SEE PREVIOUS PAGE) NRS 294A 365	DATE OF EACH EXPENSE	AMOUNT OF EACH EXPENSE
	N/A		

This page may be copied or duplicated if additional space is needed.

IN KIND CONTRIBUTIONS AND EXPENSES REPORT

IN KIND CONTRIBUTION IS DEFINED AS THE VALUE OF SERVICES PROVIDED IN KIND FOR WHICH MONEY WOULD HAVE OTHERWISE BEEN PAID.

In kind contributions and expenses include: paid polling and resulting data, paid direct mail, paid solicitation by telephone, any paid paraphernalia that was printed or otherwise produced to promote a campaign and the use of paid personnel to assist in a campaign. An in kind contribution may also include but is not limited to goods and services such as billboards, office space, printing, food and beverage and yard signs.

The donor of in kind contributions shall furnish to the recipient (candidate or other person), a written statement setting forth the actual cost of those services or the fair market value with 30 days after the time he furnishes those services. (NAC 294A.43)

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Example of in kind expenses: *(1) A person contributes the use of a large room to a candidate as an in kind contribution. Once the candidate utilizes the room it becomes an in kind expense to be reported.*

IN KIND CAMPAIGN CONTRIBUTIONS **Report Period #3**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

IN KIND

Contributions in Excess of $100 or, When Added Together from
One Contributor Exceeds $100
Transfer Total Value of All In-Kind Campaign Contributions to Line 7 of Contributions Summary

CONTRIBUTOR'S NAME AND ADDRESS	DATE OF EACH IN-KIND CONTRIBUTION	DESCRIPTION OF EACH IN-KIND CONTRIBUTION	VALUE OR COST OF EACH IN-KIND CONTRIBUTION COMMITMENT	CHECK HERE IF LOAN	NAME AND ADDRESS OF 3RD PARTY IF LOAN GUARANTEED BY 3RD PARTY	NAME AND ADDRESS OF PERSON WHO FORGAVE THE LOAN
ART ASSOC. RENO, NV	8-4-06	CONSULTING SERVICES	$900			
"	9-27-06	"	"			
"	9-28-06	"	"			
"	10-9-06	"	"			
"	10-12-06	"	"			
"	10-13-06	"	"			
"	10-19-06	"	"			
"	10-23-06	"	"			
"	10-31-06	"	"			
"	11-02-06	"	"			

IN KIND WRITTEN COMMITMENTS **Report Period #3**

MIKE CARRIGAN	CITY COUNCIL	
Name (print)	Office (if applicable)	District (if applicable)

In-Kind Written Commitments in Excess of $100 or, When Added Together from One Entity Exceeds $100

Transfer Total Amount of All Written Commitments to Line 6 of Contributions Summary

NAME AND ADDRESS OF PERSON WHO MADE THE IN-KIND COMMITMENT	DATE OF EACH IN-KIND COMMITMENT	AMOUNT OF EACH IN-KIND COMMITMENT
	N/A	

This page may be copied or duplicated if additional space is needed.

IN KIND CAMPAIGN EXPENSES **Report Period #3**

MIKE CARRIGAN	CITY COUNCIL	WARD 4
Name (print)	Office (if applicable)	District (if applicable)

IN KIND

Expenses in Excess of $100
Transfer Total Value of All In-Kind Campaign Expenses to Line 11 of Expenses Summary

NAME AND ADDRESS OF PERSON, GROUP OR ORGANIZATION WHO RECEIVED THE IN KIND GOOD(S) OR SERVICE(S)	DESCRIPTION OF EACH IN KIND EXPENSE	DATE OF EACH IN KIND EXPENSE	VALUE OR COST OF EACH IN KIND EXPENSE
	N/A		

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BEFORE THE NEVADA COMMISSION ON ETHICS

-oOo-

OPEN SESSION

Opinion Requests: 06-61, 06-62, 06-66, 06-68

WEDNESDAY, AUGUST 29, 2007

Legislative Building
401 S. Carson Street, Room 3138
Carson City, Nevada

Reported by: ERIC V. NELSON, CCR 57, RPR, CM

A P P E A R A N C E S

COMMISSION MEMBERS PRESENT

MARK HUTCHISON, Vice Chairman

TIMOTHY CASHMAN

WILLIAM FLANGAS

RANDALL CAPURRO

CAREN JENKINS

RICK HSU

* * * *

CARSON CITY, NEVADA,
WEDNESDAY, AUGUST 29, 2007

9:32 A.M.

-oOo-

2. Open session to hear testimony, receive evidence, deliberate and render an opinion relating to Requests for Opinion submitted pursuant to NRS 281.511(2)(b), alleging that certain conduct of Michael Carrigan, Councilman, City of Sparks, violated the provisions of NRS 281.501(2), NRS 281.501(4), and NRS 281.481(2).

[4] VICE CHAIRMAN HUTCHISON: The next agenda item will be Agenda Item No. 2. This is an open session to hear testimony, receive evidence, deliberate and render an opinion relating to Requests for Opinions submitted pursuant to NRS 281.511 subsection (2)(b), alleging that certain conduct of Michael Carrigan, Councilman, City of Sparks, violated the provisions of NRS 281.501 subsection (2), NRS 281.501 subsection (4), and NRS 281.481 subsection (2).

Are there any disclosures to be made prior to moving forward with this agenda item? Commissioner Cashman.

COMMISSIONER CASHMAN: Thank you, Mr. Chairman. I do have a disclosure to make.

In reviewing the material for today's hearings, I discovered that Summerset, LLC, made a contribution to Mr. Carrigan in the amount of a

thousand [5] dollars in August of 2006. I'm a 12 percent owner in that real estate company and on its board of managers.

As such the board of managers provides strategic guidance to the company on a quarterly basis and does not involve ourselves in the company's day-to-day management.

Summerset, LLC, is directed on a daily basis by its managing partner who makes all the decisions relating to political contributions of the company. I have never met Mr. Carrigan, and I do not have any relationship with him either personally or professionally.

I have carefully reviewed these facts and feel that my consideration of this case will not be materially affected in any way and I can objectively rule on the merits without prejudice.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Cashman. Further disclosures?

COMMISSIONER HSU: Mr. Chair.

VICE CHAIRMAN HUTCHISON: Commissioner Hsu.

COMMISSIONER HSU: Yes. I have never met Mr. Carrigan, do not know him personally, either, but I do have a disclosure to make.

As an attorney, I was involved in litigation involving a witness in this case, Carlos Vasquez, I think it was in 2005. I had brought litigation on behalf of [6] his father, Carlos Vasquez's father, Laurie Vasquez, and the litigation was against Art

Associates and Electrographics, which were two businesses that his father used to own. The litigation concerned his father's sale of stock back to those companies, and at the time both companies were controlled by Carlos Vasquez. That litigation was resolved quickly. I no longer represent his father on that.

Subsequent to that I found out that after the dispute, that Carlos Vasquez has apparently hired one of my law partners, Kurt Hunsberger, to do legal work for him, estate planning and corporate work. Kurt Hunsberger, I talked to him yesterday, he has not provided any legal advice on matters relating to the Lazy 8 project or any campaign work performed by Mr. Vasquez.

Under my firm's compensation arrangement, I do not share any fees that Carlos Vasquez would pay to my firm. My salary neither increases nor decreases if Carlos Vasquez pays my firm for any legal work that they provide. And again, I'm not involved in any of that kind of legal work that Kurt Hunsberger is doing.

I have looked at this pretty closely. I don't have any pecuniary interest in the outcome of the case. I do not believe the independence of judgment of a reasonable person in my situation would be materially [7] affected by my law firm's commitment to a witness in this case, Carlos Vasquez, regarding his estate planning and corporate matters. I think I can remain impartial.

I do think that Mr. Carrigan should have an opportunity if he wants to object to my service on

this Commission today, and I will not hold that against him if he does. I will certainly -- if he does want to do a motion to disqualify and this Commission agrees to disqualify me, that's fine, too. I can sit out, and I brought my laptop, I can do some other work.

So that being said, this is a fairly long-winded disclosure, but I do believe I could sit in and will respect the Commission if it decides otherwise. Thank you.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Hsu.

Mr. Carrigan and counsel, would you like to come up for just a minute? We can address the disclosures, disclosure matters. Both Commissioner Cashman and Commissioner Hsu have made disclosures, and both I believe intend to proceed with participation on the Commission's decisions today. And the question now before you is, do you have any objection to either Commissioner Cashman or Commissioner Hsu proceeding with their participation here.

[8] MR. THORNLEY: No, Mr. Vice chairman, we have no such objections.

VICE CHAIRMAN HUTCHISON: Counsel, can you identify yourself for the record, please?

MR. THORNLEY: My name is Doug Thornley.

VICE CHAIRMAN HUTCHISON: Doug Thornley?

MR. THORNLEY: Yes, sir.

VICE CHAIRMAN HUTCHISON: Thank you, Mr. Thornley.

MR. CREEKMAN: Mr. Vice chair, I'm David Creekman.

VICE CHAIRMAN HUTCHISON: Mr. Creekman.

MR. CREEKMAN: C-r-e-e-k-m-a-n.

VICE CHAIRMAN HUTCHISON: I know who you are.

MR. CARRIGAN: And I'm Mike Carrigan.

VICE CHAIRMAN HUTCHISON: All right. Thank you, Councilman. And Mr. Thornley, will you be representing Mr. Carrigan today along with Mr. Creekman, or is Mr. Creekman here more in the capacity as a representative and counsel for the City?

MR. THORNLEY: Mr. Vice Chair, you are correct with your first statement, we will both be representing Mr. Carrigan today.

VICE CHAIRMAN HUTCHISON: Okay. All right. Let me explain to you the process today that the [9] Commission will pursue. This will be an administrative hearing. A lot of us are trial lawyers, and perhaps those of you in the audience have seen courtroom drama play out, and there is all kinds of rules in the courtroom that don't necessarily apply here. The rules of evidence are much more relaxed and it is a more give and take I think relaxed atmosphere.

But there are still order that will be followed and protocol that will be followed as well as rules that will be followed. But we're not necessarily following the rules of evidence and civil procedures as we would in a trial.

Mr. Thornley, you will have an opportunity to make an opening statement if you'd like, sir. After your opening statement, if you choose to make one, then as the Chair I will call the witnesses, and the members of the Commission will have an opportunity then to question those witnesses. Once we have concluded our questioning, then, Mr. Thornley or Mr. Creekman, you can cross-examine the witnesses if you'd like. You then, after you have had an opportunity to cross-examine and the Commission has had an opportunity to examine witnesses that the Commission will call, then counsel for Mr. Carrigan will have an opportunity to call any witnesses that haven't already testified, if you wish.

[10] Following the witnesses's testimony, I will then close the testimonial portion of the hearing, and then I'll call for deliberation of the various Commission members.

Following our deliberations we will then call for votes on each of the alleged violations and the Commission will render its opinion on the issue of whether Mr. Carrigan violated any of the statutes involved in this hearing. A written opinion will be published and provided to Mr. Carrigan and his attorneys, and Mr. Carrigan has the right to subsequently request judicial review of the opinions

under the provisions of NRS Chapter 233B if he so chooses.

Are there any questions, counsel or Mr. Carrigan, about the proceedings today?

MR. THORNLEY: Mr. Vice Chair, before we get started, will we have an opportunity to discuss the motion to dismiss that was filed with your Commission?

VICE CHAIRMAN HUTCHISON: Yes, you will. Matter of fact, we can take up the motion in just a minute. I wanted to get to a couple of other items including stipulated facts that you had presented as well before we begin opening statements.

Why don't we go ahead and swear in the witnesses who will be presented today, and then we can [11] take those witnesses into the room and wait their testimony prior to counsel's opening statement. Is that the way that we should proceed, counsel?

MS. FRALICK: Yes, it is.

VICE CHAIRMAN HUTCHISON: Okay. I know that there are two witnesses who will be called today, Mr. Carrigan and Mr. Vasquez will be called by the Commission. I know that there will be Ms. Beth Cooney and Jeannie Adams will be called on behalf of Mr. Carrigan. So if those four witnesses could stand and be sworn in.

MR. THORNLEY: Mr. Vice Chair.

VICE CHAIRMAN HUTCHISON: Yes.

MR. THORNLEY: There are two more witnesses to be called by Mr. Carrigan.

VICE CHAIRMAN HUTCHISON: Please tell me who they are.

MR. THORNLEY: Mr. James Valline.

VICE CHAIRMAN HUTCHISON: I have it right here. James Valline and also James deProsse. So we have six witnesses then. And do we usually swear these all in together or individually?

Can you all six -- and I just want to make sure all six are in the room. Mr. Carrigan as well. Thank you. So we have all six of our witnesses. Can you [12] all please raise your right hand and be sworn in by the court reporter.

(Six witnesses sworn.)

VICE CHAIRMAN HUTCHISON: Thank you. Now we'd like to have the witnesses who will testify just wait in the room next door, and we will call you as your testimony is needed. Thank you so much.

(Witnesses excluded except for Mr. Carrigan.)

VICE CHAIRMAN HUTCHISON: We will take up the motion to dismiss. Mr. Thornley, I have had a chance to review this motion carefully. I think that there are many points that are made that are well taken and they present a lot of issues that the Commission I think needs to address after hearing testimony, and I think that once we conclude our testimony as well as our deliberations, we have dealt with all the issues that you raise in your brief, and I think in the interests of fairness and equity we will proceed with the hearings, we will hear testimony on that, and then we will render our decision.

If you still think that there are outstanding issues that we haven't hit, you can certainly bring it to my attention, but I believe we will hit them all, counsel, during the course of our deliberations. Therefore, I'm going to deny the motion at this point and allow the Commission to hear the evidence and then render [13] its decision.

MR. THORNLEY: Thank you, Mr. Vice Chair.

VICE CHAIRMAN HUTCHISON: You are welcome.

Now we have stipulated facts that were presented. Ms. Fralick, I believe that these are stipulated facts that are presented by Mr. Carrigan's counsel; is that correct?

MS. FRALICK: That is correct, Mr. Vice Chair.

VICE CHAIRMAN HUTCHISON: Has the Commission had a chance to take a look at the stipulated facts? I'll give you my thoughts about them, and I'm certainly happy to entertain any other thoughts that any of the members of the Commission may have.

I think that some of these facts are easily established and stipulated to, and we appreciate the expediency with which the hearing will progress if we do stipulate to some of these facts. Facts 10, counsel, 10, 11, 12, 13, 14 and 15 seem to be facts that are not really stipulated facts, facts that really require a factual analysis and the application of the relevant statutes and law to those facts. In addition, I don't believe that we have jurisdiction over

stipulated fact number 11 concerning reported campaign contributions.

So those are my thoughts. I'd certainly like [14] to hear any of the thoughts from the other Commission members concerning the acceptance of these stipulated facts. Any other Commissioners want to chime in? If not, then let me tell you what I suggest.

COMMISSIONER JENKINS: Did you include 10?

VICE CHAIRMAN HUTCHISON: I included 10 in my list of things that I think are questions of law and fact that we probably can't stipulate to.

Let me tell you what I think we can stipulate to, and Commissioners, you can tell me if you disagree. I think we can stipulate to 1 through 9, and we can stipulate to 6.

COMMISSIONER JENKINS: 16.

VICE CHAIRMAN HUTCHISON: Excuse me. 16 and 17.

COMMISSIONER JENKINS: So moved.

VICE CHAIRMAN HUTCHISON: Anybody second that motion to accept the stipulated facts, stipulated facts 1 through 9 and 16 and 17 as presented by counsel for Mr. Carrigan?

COMMISSIONER HSU: Second that.

VICE CHAIRMAN HUTCHISON: Seconded by Commissioner Hsu. Any discussion on the motion?

Let's go ahead and call for a vote. All those in favor say aye. Any opposed?

[15] (Whereupon, the motion was put to a vote and carried unanimously.)

MR. CASHMAN:	Aye.
MR. FLANGAS:	Aye.
MR. CAPURRO:	Aye.
MR. HSU:	Aye.
MS. JENKINS:	Aye.
MR. HUTCHISON:	Aye.

VICE CHAIRMAN HUTCHISON: All right. So for the record then, the facts as I have outlined them are stipulated. Facts 10, 11, 12, 13, 14 and 15 are not.

Let's see if we can get on the same page here and sort of focus our issues and our efforts here today and be as efficient as we can. We want to give everybody a full opportunity to be heard, examine the witnesses, really air these issues, and make sure that everybody feels like the process is fair and we have had a full opportunity to engage in the process and be heard completely.

The first issue that is before the Commission deals with NRS 281.481 subsection (2), and really a way to define that issue is did Councilman Carrigan use his official position to secure or grant unwarranted privileges, preferences or advantages for himself or a person to whom he has a commitment in a private capacity to the interests of that person when he voted on the Lazy 8 matter.

The second major issue before the Commission [16] deals with NRS 281.501 subsection (4), and that issue can be expressed, is Councilman Carrigan's

relationship with Mr. Vasquez a relationship enumerated in NRS 281.501(8). If so, did Councilman Carrigan fail to sufficiently disclose his relationship.

The third issue before the Commission deals with NRS 281.501 subsection (2), and that is should Councilman Carrigan have abstained from acting on or voting on the Lazy 8 matter.

And those are really the three major issues. I know that there will be sub points, sub issues, different permutations raised during the course of this hearing. But, counsel, would you agree that those are the major issues that we're dealing with in this case?

MR. THORNLEY: Yes, Mr. Vice chairman, I will.

VICE CHAIRMAN HUTCHISON: Thank you, counsel.

All right. We're going to go ahead and call our first witness on behalf of the Commission, unless I need to do anything else, counsel.

MS. FRALICK: Mr. Vice Chair, if you would like to have Mr. Thornley's opening statement at this point before we call the witnesses.

VICE CHAIRMAN HUTCHISON: Thank you. I forgot all about that. Mr. Thornley, will you please [17] provide us with your opening statement if you wish.

MR. THORNLEY: Thank you, Mr. Vice Chair. Good morning, Commissioners.

VICE CHAIRMAN HUTCHISON: Good morning.

MR. THORNLEY: As you know, Councilman Carrigan has been accused of violating three provisions of Nevada Ethics in Government law. But what you may not know is why the ethics complaints were filed in the first place. If you think the politics on a national stage are ugly, then you have never played ball at the local level.

Today you will hear testimony that Councilman Carrigan has committed no violation of NRS 281.481 sub (2), 281.501 sub (2), or 281.501 sub (4). You will learn that the complaints filed in this matter were an orchestrated political vendetta mounted by individuals and interests unhappy with Councilman Carrigan's position on the Lazy 8 project and exacerbated by Councilman Carrigan's recent reelection which demonstrates the City of Sparks apparent satisfaction with his representation.

At the conclusion of this proceeding I'll come back to you and together we will apply the facts of this case to the law in question. The overwhelming and undisputed evidence will show that absolutely no violation of Nevada's Ethics in Government law occurred in this case. Councilman Carrigan's role in government [18] is to provide a voice to the people he represents. That's what happened here and that's what the citizens of Sparks hope continues to happen. Thank you.

VICE CHAIRMAN HUTCHISON: Thank you very much, counsel. We will go ahead and have the

Commission call its first witness, which is Michael Carrigan.

MICHAEL CARRIGAN

called as a witness,
was examined and testified as follows:

EXAMINATION

VICE CHAIRMAN HUTCHISON:

Q Mr. Carrigan, you have already been sworn in as a witness in this case. Each of the Commissioners will either ask you questions or not ask you questions sort of depending on what their feel of the facts is like and what issues that they have and what questions they have in mind.

I think first just sort of as an overview, I would like to ask you some questions, and I'm sure my fellow Commissioners will get into much more detail. But as you know, the heart of this matter is really going to get to your relationship with Mr. Vasquez.

Am I pronouncing that correctly?

A Vasquez.

Q Vasquez. Mr. Vasquez, and the extent of that relationship, how long lasting its been, the financial aspect of that relationship, the political aspect of that [19] relationship, the business aspect of that relationship. So I'd like to try to just get that out initially --

A Okay.

Q -- by asking you a series of questions now that you know where I'm going. Let's talk first about the

personal relationship or the friendship relationship or the family relationship that you have, that your wife has, that your family has with Mr. Vasquez and his spouse and his family. Just give me an overview there, please.

A Sure. 1991 I got stationed in NES Fallon, and my wife is a schoolteacher by trade. She got a job teaching with Carlos's wife. She team taught. That is when they first met. That is when I first met Carlos. That would have been probably October of 1991.

Q Okay. Now so the relationship with your families began with your spouses?

A Yes.

Q They team taught and that relationship started about in October of 1991?

A Correct.

Q And did that relationship with your spouses, to your knowledge, also involve social aspects or was it at that time, sort of focusing on October 1991, that [20] early time frame, was it pretty much they were team teaching and that was their relationship?

A Yes. They have gone of course to some of the school functions together. But that's how it started off is they were teaching together.

Q Did it progress then where they began to socialize, become more friends outside of the classroom and professional environment?

A I would say yeah, they became pretty good friends. They team taught. You are going to become

good friends or you are not going to get along very well when you are teaching.

Q When would you say that that friendship began to materialize beyond just simply being acquainted with each other and professionals in the classroom and really moved on and became good friends outside of the classroom? When did that begin?

A You know, I couldn't give you a time frame on that. I could just say it evolved into that they were friends.

Q Okay. And then did there come a time then when you began to be friends or become acquainted with Mr. Vasquez?

A Yeah. Usually what happened is that they had a Christmas party or something. Most of the spouses were [21] in the education field. I was in the military. Carlos was not in the education. So we kind of stayed together because the other people ignored us. If you have anybody that's in teaching, you know what I'm talking about. We kind of started talking.

Basically I was still in the military at the time, and he told me that he was in -- he ran campaigns, and offhandedly one time, and this was a long time ago, he said if you ever want to run for public office, give me a call because that is what I do for a living. And I'm sure he's regretting that I called him in 1999.

Q Now when do you recall first actually becoming acquainted then with Mr. Vasquez?

A I remember exactly, it was at the first Christmas party.

Q Would that have been in December of '91?

A 1991.

Q And then you continued to be acquaintances ever since December of 1991 and then that turned into more of a friendship?

A Yeah. It was kind of odd. The only time I ever saw him was at a school function.

Q Okay. So if there was a party, a gathering, open houses, whatever it was, you ran into each other?

A Generally he and I tried to stay away from those, but every once in a while we got lassoed into [22] going, and we kind of commiserated together in the corner.

Q Tell me when that relationship changed in any way from beyond commiserating with each other in the corner at these functions to something more than that?

A I think in 1999 when I asked him to run my first campaign, he became my campaign manager.

Q And what were you running for in 1991 -- 1999?

A 1999 I ran for Council Ward 4 in Sparks. That was my first election.

Q Were you successful?

A Yes.

Q All right. And can you tell me what type of an involvement you guys had as a campaign manager and as a candidate during the course of that 1999 run?

A I was a rookie. I had never run for political office. I retired out of the military in 1992. And so the city councilwoman who had that position decided not to run again, and I was complaining, and my wife said, quit complaining and run if you want to. So I called Carlos up and said, hey, remember in 1991 you said you could run a campaign, would you like to help me.

And he said, okay, let's do it. And I was probably -- there were seven people running, and I was the [23] biggest dark horse out of the seven.

Q And was Mr. Vasquez instrumental, in your view, in getting you elected?

A Yes.

Q Why?

A Because he is a good campaign manager.

Q And being a good campaign manager, what did he do to help get you elected with your experience with him in 1999?

A It was strategy, basically. Political strategy on what to do.

Q I want to stay with -- I want to take them in segments here. The 1999, he is your campaign manager, you are a dark horse, nobody gives you a shot. He's a very good campaign manager, good

strategy, good comments and good thoughts about how to win elections?

A Yes.

Q And in fact, you go on and win the election?

A I do.

Q Now how long does that campaign take where you are involved with each other on I'm sure a regular basis during that campaign?

A In 1999 Sparks elections were in the summer. We changed that a couple years ago because we want to go [24] in November with everybody else, because number one, it was cheaper for our citizens, and number two, we wanted a better turnout. So our elections were in June. We usually started probably April. So I would say April, May and June. So three months.

And at that time in 1999, it was a very small election. I mean, in other words, it was just the City of Sparks, there were no national issues and there were no other elections on the ballot.

Q It was a very parochial election?

A Exactly.

Q I want to stay with the 1999 time frame. Let me shift you now. Did Mr. Vasquez or his spouse or anybody that you know he controlled or directed do any more work for your campaign?

A No.

Q Did they provide any in-kind contributions in that 1999 time flame?

A You mean for the election?

Q For the election, either him or spouse or people he controlled or knew?

A Yes.

Q Can you describe those, please?

A Basically they were consultation. So we in kind the consultation fees. In other words, he told me [25] how much he generally charged other people, and we wrote that in as a campaign contribution.

Q As an in-kind contribution?

A Yes. Everything that he did for me in 1999 was in-kind. There were no money, he didn't --

Q No contributions?

A No. As a matter of fact, I financed my first election about 90 percent out of my own pocket.

Q So your testimony is then in 1999 the only contribution that Mr. Vasquez made to your campaign was in-kind consultation as you described as your campaign manager?

A Correct. And to go on to our spouses, his wife had quit the school district by that time because she was pregnant and had a child. So our two spouses didn't have any other formal I guess working relationship.

Q To your knowledge, did your wife's friendship with Mr. Vasquez's wife continue from October 1991 to the present?

A Sure, they call each other on the phone. As far as going out, no, they didn't do much. She was raising two children. So they didn't get out very much. Mrs. Vasquez didn't get out very much. It was still a phone call. They are professionals, and they would talk [26] about educational issues probably. I'd define it as on a professional level after that.

Q Now can you give us a period of time when they were more social-type friends?

A You know, I would have to say from '91 to whatever. You can ask Carlos when his wife quit because I'm not sure exactly of the date. But I would say while they were teaching they did go out on a few things.

Q But you know she quit before the '99 campaign?

A You know, I'm guessing. I think she did. I'm trying to remember. Their child is 12 years old. So I think so.

Q Okay.

A So if you back that up, I guess it would have been '93 maybe when she quit, I think. But you can ask Carlos.

Q Now any other contributions, efforts towards your campaign you can think of in 1999 that relates to Mr. Vasquez or his family or those that he had influence over?

A Everything that -- all the in-kind was noted on my campaign disclosure report in 1999.

Q Now let's move forward then. When do you next -- well, let me ask you: After the campaign, I'm [27] sure you are happy you are elected; correct?

A Correct.

Q Now what is your relationship like with Mr. Vasquez after 1999, immediately after the 1999 elections?

A Then our relationship got closer because he was my campaign manager. So at times I would ask him for political advice.

Q And this was after the '99 campaign, before the next campaign, you are close, you are good friends, you are asking him for some political advice as you are going through issues or matters as a city councilman?

A Correct.

Q Now when do you run again, what year?

A 2003. Once again it is a June election.

Q So walk us again through that process in terms of Mr. Vasquez's relationship with you in that process.

A I asked him again. I said I'm going to run for re-election, would you run my campaign, and he said, I sure will. So we started about three months before the election. And I have to point out that in 1999 I won by 41 votes.

Q In 1999 you won by 41 votes?

A In 1999 I won for 41 votes. In 2003 I won by [28] 65 percent to 35 percent.

Q So a big improvement?

A It was a very big improvement. But I bring that up because I think later on you know, the people seem to like the job I was doing.

Q Fair enough. So he continued to do the same type of things that he did for you in '99. He is a good campaign manager, he gets you good, astute, political advice, you take it up, you win, win big this time and you are happy?

A I'm very happy.

Q Now let's move to the contributions that he made or his spouse made or anybody that you know that he had influence over during the 2003 campaign season.

A Once again no money. But he did have consultations with me, and you don't really have to disclose that because, I mean, a meeting is a meeting, but we did because I like everything to be on board. I didn't want anybody to say you didn't disclose it.

So we have disclosed, and I can't remember what the in-kind disclosure was as far as how much it was. I really don't remember that one. And I think you have that.

Q We have all that information, right. But again, there was, as far as contributions, there was the [29] in-kind consultation as political advisor, campaign manager; correct?

A Correct.

Q No money, though, in 2003?

A No money. And I didn't have to put any of my own money into that race.

Q You were supported by campaign contributions?

A Yes.

Q Now what about his -- what about Mr. Vasquez's spouse or those that he knew that he had influence over or asked to contribute to you, did anybody that you know contribute to you financially or in kind to that 2003 campaign as a result of Mr. Vasquez's efforts?

A From his family?

Q Or from his friends or people he had influence over.

A I know that his family, it was only in kind from Carlos for his consultation services, and then I disclosed everybody else. And if he went and said, hey, Carrigan is a good guy, contribute to his campaign, I don't know who he did that to. Because they usually don't come up to me and say that. They say we would like to support your campaign and here is a contribution.

Q Right. In 2003, did you consider Mr. Vasquez's solicitation of campaign contributions to be [30] part of his job duties as your campaign manager?

A Yes.

Q Is the same true in 1999?

A Yes.

Q Now, 2003 election concludes, you have won big, you are even happier now. Now describe -- by the way, you spent three months again with him?

A About three months.

Q About three months during the campaign season with him? Now describe your relationship immediately following the 2003 election.

A It was the same as from 1999, the 2003. He was my campaign manager, he is a good political strategist. We became friends, and I asked him for advice, if I needed some advice, and we went out to dinner, and he became a good friend.

Q So similar type of relationship that you described following your 1999 campaign?

A Yes.

Q I mean, you are good friends, he's a trusted political confidante, a personal confidante that you seek for political advice and understanding; right?

A Yes.

Q You are social, have dinner together, you continue to socialize?

[31] A Correct.

Q Now during that time do your wives also socialize with you at dinner?

A No. At that time, no. She was still home with -- Mrs. Vasquez was still home with her children. So their relationship kind of parted ways. I mean, they still stayed friends, but it was more of a phone call, that type of thing.

Q Now when did you run again?

A 2006. We switched our election from June to November. So my term was only three and-a-half years.

Q Can you describe, please, your relationship with Mr. Vasquez during that 2006 campaign?

A Once again I asked him to be my campaign manager and he said yes. And this election is a little longer. This is the first time I had been in the deep end of the pool. We were running in a November election. There was everybody and their brother was running during the same election.

So the election season is a little bit longer, and since they moved the primary back to August, we had to start strategizing a little bit earlier. So it was longer than three months from that time. When did we start? February, January or February, something like that probably.

[32] Q So how many months would you estimate during the 2006 time period you were spending in close communication and work with Mr. Vasquez?

A Six months probably, I'd say. Give or take a month or two.

Q Now you were re-elected?

A Yes.

Q So you were happy about that?

A Yeah. I was very happy with this election because it got to be a very contentious election.

Q Why was that?

A Because one of the power brokers in Sparks, John Asquaga's Nugget, didn't like what I was doing as the City Councilman and basically went out and recruited, tried to recruit people to run against me and finally found one and poured a lot of money into the campaign, and basically they ran a campaign on one thing and that was a project that was in my ward. So he came out, my opponent came out against the project. I had voted for the project. And that was the biggest issue for the whole entire campaign.

Q During the 2006 election did the Lazy 8 project come up at all as a campaign issue?

A That was the campaign issue. My opponent came in front of us in the meeting that we were voting on [33] the Lazy 8 and basically said that 70 percent of the people in Sparks had told him that they didn't want the Lazy 8. That worried me.

Because I had the luxury this time of knocking on doors because I was running for election. A lot of times when you are voting on issues you can't talk to all your constituency. This time I could and I was knocking on doors. I knocked on 2500 doors with my wife. How do I know that? Because we made up 2500 fliers, and when they ran out, I was done.

Only one family said they didn't support the Lazy 8. So when I heard that I said, well, my constituency wants this. And I don't know where my opponent is coming from because his numbers were completely different than mine.

So yes, that whole campaign was run on one project. Now I have to tell you that I won that

election by 62 percent, 62 to 38. So it was a little bit closer to what I had thought than what my opponent had thought.

In other words, that campaign was strictly on one thing. If the citizens of Sparks didn't want that Lazy 8, they knew where I stood on it, I wouldn't be here. And the interesting thing is that a city councilwoman that did vote for the project got voted out of office -- or didn't vote for the project, got voted out of office.

[34] Q So your testimony, Councilman, is that the 2006 election really was a referendum on the Lazy 8 project?

A I didn't want to make it that, but my opponent did, and so that's where it went. And when he came out and was supporting against the casino, then he shifted the whole paradigm of the election, and that's all anybody wanted to talk about. They didn't want to talk about anything else. So I would have to classify it as yes, that was pretty much the whole election.

Q Now staying with our pattern here, can you talk about any contributions that Mr. Vasquez made during the course of the 2006 campaign, please?

A I remember all of these now because he gave in kind of about $875 for a logo. In other words, his firm designed a new logo, because instead of saying Elect Mike Carrigan, it was Retain Mike Carrigan. We had to switch over to a new logo. So his advertising agency did that, and so we marked that down as in kind.

And then once again, it was all consultation fees and that was listed as in kind. So that was all I got from Carlos or anybody in his family or any of his businesses was only in kind.

And wasn't anything tangible either. In [35] other words, they didn't give me billboards or they didn't give me anything else. It was strictly advice, and once again, we didn't have to do that but I wanted to put it down.

Q During the 2006 campaign did your campaign pay Mr. Vasquez's ad agency?

A If you see in my campaign disclosure report that I wrote about $46,000 worth of checks to Carlos's ad agency, but that was a pass through fee. In other words, we had -- this is the first time we had to go on TV, and if any of you have ever seen a campaign, it is very expensive. So they would buy TV time, and I would write the check to his company, and his company would write the check to whatever the outlet was.

So in other words, he didn't charge any kind of a commission fee or anything. It was all that money was a pass through. In other words, I wrote him a check for whatever it was, and he passed it through to the whatever agency needed to get paid.

Q How do you know that?

A How do I know he did it?

Q That it was a pass through. How do you know there was a pass through?

A Because of the books we kept.

Q That question has come up, and you asked and [36] inquired and you learned that it was a pure pass through, there was no -- a lot of times ad agencies will add on an administrative fee or add on some sort of profitability fee or a consultation fee.

A I looked at the books all the time. One of the reasons that we kept such good books is because it was a very contentious election. We wanted to make sure that we were above board with every single thing we did. We wanted to make sure that everybody knew that he didn't get paid. I mean, he ran every single campaign for free.

Q Now do you think or do you know whether as a result of his ad agency you were actually as a candidate able to get better deals on air time or radio time?

A I really wish that was the case, because during that election was also a presidential election and senatorial election. You couldn't buy time on Channel 8 or 2 or 4 because they had it all wrapped up. So I wish he did have a better -- it would have helped me out, but the answer to your question is no. We were just like everybody else.

Q So you're saying the demand was just too great, nobody was cutting you a deal?

A Exactly. The way you work is you get a hold of all the TV and a lot of the cable, there is a lot of cable. You get a hold of them and say do you have any [37] time and how much is it going to cost, and they say here it is and you just buy it. You have kind of no choice when they run it. Sometimes if you are up at three o'clock in the morning with nothing

better to do you will see an ad. Because it's the cheapest time.

Q Now following the 2006 election then, it is a contentious election, you win it still with what you feel is a pretty comfortable margin; right?

A If anybody in this state can win by 62 percent, it is more than comfortable.

Q You are happy at the end of the election?

A I'm very happy.

Q Your relationship with Mr. Vasquez is the same, that he continues to be a very good friend of yours, a trusted political advisor, somebody who you consult on political issues and subjects, and that relationship continues till today?

A Yes.

VICE CHAIRMAN HUTCHISON: That's the overview that I wanted to lay. And I want to now pass the questioning on to any other of my fellow Commissioners who would like to follow up. Commissioner Flangas.

EXAMINATION

BY COMMISSIONER FLANGAS:

Q Well, Mr. Carrigan, in looking at your – [38] just for clarification, in your original election you had a $5,000 from the Art Associates and 5,000 each from Carlos and Laurie Vasquez. Now that was in kind?

A Yes, it was all in kind.

Q Do I have that right?

A Yes, sir.

Q Now my principal question here is on August 23rd, you had a Sparks City Council meeting, and from I have seen here, it was very contentious and fairly dramatic. Now in that meeting John Mayer, Phil Salerno and Judy Moss voted against the Lazy 8, and you and Ron Schmitt voted in favor.

A That is correct.

Q Now then on or about August 24th, 25th, the developer Harvey Whittemore threatened to sue Sparks for damages in the hundred million dollar range. The developer argued that he had the right to move a 1994 casino development approval from Whittemore's Wingfield Springs in Sparks to the Pyramid Highway. And in spite of the Sparks Planning Commission having voted four to three against the Lazy 8 a month prior to that.

So that took place in that time frame.

A Correct. The Planning Commission voted it down, and so did the City Council, against the advice of our attorney, by the way.

[39] Q Now on or about September 1st, a private vote was taken to settle the threatened lawsuit.

MR. CREEKMAN: Excuse me, Mr. Vice Chair, I'm going to have to object to this line of questioning. The incident which gave rise to this proceedings occurred on the 23rd of August.

Anything which occurred subsequent to the 23rd of August should, in my mind, have no relevance.

VICE CHAIRMAN HUTCHISON: The events in question that are being elicited by this line of questioning deal with events post August 23rd, '06?

MR. CREEKMAN: Yes, Your Honor. Council Member Flangas's question started or line of questioning started with the 23rd of August, moved to the 25th of August and to a lawsuit, this was brought against the City of Sparks on that date, and the latest question just went to activities or events which occurred on September 1st.

VICE CHAIRMAN HUTCHISON: Counsel, I would be interested to just kind of talk with you about this a minute. I could see where in a broad sense post August 23 events could have some impact on whether the Councilman had a particular type of relationship, business relationship, was involved in a financial arrangement, had an economic dependence on somebody. So [40] are you saying that no matter what the question is post August 23rd, that the Commission just cannot inquire? Is it sort of a blanket position or is it more of a fact specific?

MR. CREEKMAN: It is a blanket position that I'm taking. Whatever occurred after the 23rd of August should have no relevance to this Commission's proceeding today. It was the disclosure made by Councilman Carrigan on the 23rd of August which gave rise to the complaints which gave rise to all of us being here today.

VICE CHAIRMAN HUTCHISON: Go ahead. I'm sorry.

MR. CREEKMAN: Commissioner Flangas did ask a very relevant question of Councilman Carrigan, and that went to the question of his vote and Councilman Carrigan's response went to the fact that he voted on the losing side of the issue on the 23rd of August. Again, what happened in the Second Judicial District Court, what happened with the City Council at any point subsequent to the 23rd of August, in my mind, has no relevance.

If you were to expand the relevance, you would be -- you would expand this Commission's jurisdiction into proceedings that are now pending before the Nevada Supreme Court. I mean, the logical expansion of that argument or extension of that argument would take [41] you into the chambers of the Justices of our Supreme Court where the litigation presently resides.

VICE CHAIRMAN HUTCHISON: Counsel, I think your objection is well taken on a case-by-case basis and on particulars. But I can certainly envision where the issues are before this Commission dealing with a relationship between Mr. Vasquez and Mr. Carrigan to be relevant on post August 23rd issues. I mean, if there is some evidence that can be presented that may impact on that relationship. I do agree with you, though, in terms of getting into collateral matters that don't necessarily bear on the issues like relationship and what type of relationship that there is between Mr. Vasquez and Carrigan.

MR. CREEKMAN: I respect your conclusion, sir. But I do want it on the record that the City of Sparks on behalf of Councilman Carrigan is objecting to this

post August 23rd line of questioning and to any incidents which may have occurred after August the 23rd, which again, we feel have absolutely no relevance to this proceedings.

VICE CHAIRMAN HUTCHISON: Objection noted. Yes, counsel.

MR. THORNLEY: Mr. Vice Chair, I suppose I'm a bit confused. Are we here because of one instance that [42] something may have happened, or are we here to conduct an inquisition into Councilman Carrigan's entire life?

VICE CHAIRMAN HUTCHISON: Well, I think by your leading argumentative question, that we're not here to have an inquisition into his entire life. But I don't think -- if you want me to give an example of where I could easily see a post August 2006 event being relevant to this question I will. If you really want me to do that I'll do that. Or we can move forward. Because I don't think it is going to be particularly pleasant if we start getting into examples of where that could be relevant or not.

But suffice it to say, I think in terms of relevancy, it's going to be a case-by-case determination. I understand counsel's objection in terms of let's not get into collateral issues about lawsuits that are filed that are in the Supreme Court and things that happened a week ago that have nothing to do with this matter. I absolutely agree with that.

THE WITNESS: Sir, let me just say something. I know you are all attorneys --

VICE CHAIRMAN HUTCHISON: Actually, we're not all attorneys.

THE WITNESS: Most of you are. I'm not. I have no problem going wherever he wants to go with this [43] thing. I know that he's trying to protect the City. So I understand that.

But please put it on the record that I have no problem answering any single question you want to ask me because I'm not here to cover anything up. I will answer Mr. Flangas's questions on what happened after that with no problem.

VICE CHAIRMAN HUTCHISON: And I would just like to just have Commission counsel, if you want to chime in at all, or do you think it is necessary to chime in or should we just move forward?

MS. FRALICK: I just wanted to point out that we have Mr. Carrigan's Exhibit L is the stipulation and judgment and order that was filed on September 1st, 2006, and that is a matter that occurred after the date in question, and this is submitted, this was submitted for the consideration of the Commission. So just to have that on the record that we didn't just come up with any dates out of the clear sky. This is something that was filed on behalf of Mr. Carrigan. And it is in the exhibit book, and perhaps, I don't know, but I'm sure that Commissioner Flangas did look at that.

VICE CHAIRMAN HUTCHISON: So after having had said all that, counsel, is there anything else you think you need to say for the record?

[44] MR. CREEKMAN: One other point I would like to have included in the record. This proceedings was noticed under the Open Meeting Law with respect to an August 23rd violation. To the extent a decision is ultimately made with any basis from my perspective on events which occurred subsequent to August 23rd, I question this proceedings compliance with the Open Meeting Law. I just would like that established in the record also.

VICE CHAIRMAN HUTCHISON: Sure. And counsel, I'll just note that one of the statutes at issue here deals with whether or not the Councilman has a substantial or continuing business relationship with somebody, Mr. Vasquez in particular. Also there is a question as to whether or not he has a commitment or relationship that is substantially similar to interests that are disclosed in NRS 281.

So that's why I think there are some subjects that could in fact be relevant. But I think we ought to move forward with that.

With that, Commissioner Flangas, I'm sure you will limit your questioning to relevant matters regarding this occurrence.

COMMISSIONER FLANGAS: For the record, I thank Mr. Carrigan forthrightly agreeing that he will [45] answer any question that comes to him. Now getting back to my question.

VICE CHAIRMAN HUTCHISON: Go ahead.

COMMISSIONER FLANGAS: We're going to be dealing today with three potential violations of the ethics law.

VICE CHAIRMAN HUTCHISON: Yes, we are.

BY COMMISSIONER FLANGAS:

Q There is a sequence of events that took place within a month there that are interrelated and in no way that they can be separated. So when the meeting took place on or about September 1, 2, whatever that date was, that meeting was a secret meeting, it was not posted --

A Sir.

Q It violated the --

VICE CHAIRMAN HUTCHISON: Wait a minute. Let me just stop everybody for just a second.

Commissioner Flangas, if you have questions, let's go ahead and elicit questions from the Councilman. But really we shouldn't be making conclusions or drawing conclusions.

COMMISSIONER FLANGAS: I'll rephrase that.

VICE CHAIRMAN HUTCHISON: We should ask questions to elicit factual information.

BY COMMISSIONER FLANGAS:

[46] Q When that meeting took place did anybody on the Commission ask the question was this meeting posted, is it a legal meeting, does it violate the ethics --

MR. THORNLEY: That meeting was an attorney-client session.

THE WITNESS: Let me answer your question because this has been in the media 10,000 times calling it a secret meeting. If you want, some of you are attorneys so you will understand this because it was all about attorney-client privilege.

COMMISSIONER FLANGAS: You and I have something in common.

THE WITNESS: You and I aren't attorneys, sir. So I am going to tell you --

COMMISSIONER FLANGAS: We're not.

VICE CHAIRMAN HUTCHISON: Wait a minute. Let's just have some decorum, order. Nobody is to be talking over each other.

Commissioner Flangas, please yield the floor to the Councilman and allow him to speak.

THE WITNESS: First of all, according to our attorney, it wasn't a meeting, it was an attorney-client privilege. In other words, you don't have to post that because that's what our attorney said.

So to answer your question, no, because we [47] have done this many times before when we're settling lawsuits, he said, okay, come in, we have a lawsuit here, settlement agreement. Do you guys think that this is okay? Yes, no, whatever it may be.

Okay. We give him the direction, go ahead and settle it or not settle it. But as what happened in that meeting is attorney-client privilege.

So yes, there was a nonmeeting because that's what it was. I don't know what you call it. It was a gathering of --

VICE CHAIRMAN HUTCHISON: It was a meeting with your lawyers that was privileged.

THE WITNESS: That was privileged, exactly. And here is what happened. That if you are on the other side of this project and you don't want anything to happen, you get a hold of the press -- I happen to be a journalist, too, unfortunately -- and you get your PR team in place and you say let's tell them it was a secret meeting. Why? Because that looks bad.

So every single time they have come up and called it a secret meeting, our City Attorney and our Assistant City Attorney, whoever is sitting at the meeting, will get up and say, please, it was not a meeting, it wasn't secret. And kept going.

So that has been laid out a thousand times. [48] Once again, if it is in the press, it's got to be true.

VICE CHAIRMAN HUTCHISON: Councilman Carrigan, you have been very clear on that point, and in response to Commissioner Flangas's inquiry, that was a meeting that was held with counsel, it's confidential, it's privileged, and that's the makeup of the meeting. We understand that.

THE WITNESS: Correct. But if you notice, a week or two later we came into a Council meeting and we voted to settle the agreement. So we did it in public because of all the press and we said, okay, let's go in public and we vote on it in public.

VICE CHAIRMAN HUTCHISON: Counsel.

MR. CREEKMAN: And I will add that, and although I'm not testifying, I want to assist the

Commission in dealing with these issues, any action taken at what I prefer to call the attorney-client session, to avoid the use of the "meeting" word, I can represent to you was action taken by, coincidentally by our assembled City Council members, but it was action over which the City Council has no jurisdiction, control or supervision back on September the 1st. To which the Open Meeting Law does not apply.

Not only did it not apply by virtue of the fact that it wasn't a meeting, it was an attorney-client [49] session, any action that they took, and I can't go any further with respect to this issue, but any action they took was action over which the City Council has no jurisdiction, control or supervision. It was completely outside the ambit of the Open Meeting Law, contrary to representations that have consistently been made in the press.

VICE CHAIRMAN HUTCHISON: I'd like to try to avoid trying to respond to every point that's been made in the press or the media. And I understand there is a frustration level and you want to be able to express yourself, and I'm happy to allow that to occur to the extent it deals with these issues.

THE WITNESS: Well, sir, you know what, I don't mind answering those questions because it sure clears up a lot here for me rather than listen to the media or read it in the newspaper article. Because they got it wrong. I mean, that's as simple as that.

VICE CHAIRMAN HUTCHISON: Listen, we just want you, and I'm sure you are already doing

that, to respond to questions to the best of your ability, and to the extent that that requires you to elaborate in a way that is responsive to the question, great. I would rather, though, not go into, as your counsel has already pointed out, collateral matters that aren't important to [50] this hearing. So let's just stay with questions and answers.

Commissioner Flangas, do you have any further questions?

COMMISSIONER FLANGAS: No more at this time.

VICE CHAIRMAN HUTCHISON: All right. Any other Commissioner? Commissioner Jenkins.

EXAMINATION

BY COMMISSIONER JENKINS:

Q Welcome, Councilman Carrigan. I want to go back a little bit to our Vice Chair's questioning about the in-kind donations in '99, '03 and '06, if I may.

In 1999, when you were working with Mr. Vasquez, did you know anything about the plans for this Lazy 8 project?

A No.

Q Did you know Harvey Whittemore?

A No.

Q Did you know of any of Mr. Vasquez's other projects, other than working on your campaign?

A I was such a rookie, I didn't know anybody. The only person I knew in politics was Carlos, and that's why I asked him to be my campaign manager.

Once again, like I said, I was -- I got into the race two weeks before the filing date. So that was [51] kind of a last-minute decision.

Q Did Mr. Vasquez in '99 ever ask you to support any of the projects he was working on?

A Carlos has never lobbied me, ever. But the opposite is true. If you want to get on to that questioning, I could tell you how that works.

Q But you did ask him for political advice after you were elected?

A I wouldn't say -- I would say we sat down and talked about a few things. So I guess you could say – I didn't flat out say how do you think I should vote on something, but we talked about politics. I wouldn't say I asked him about advice. I would say we discussed political matters.

Q Did you at any time after you were elected in '99 and before this 2006 campaign got going learn of the Lazy 8 project, Mr. Whittemore or Vasquez's involvement in the same?

A The Lazy 8 project, I'm not sure exactly. I think it was probably a year before it came before us. So it was probably in the summer before we voted on it. Carlos wasn't even working for Red Hawk Land Company at the time.

Q So it came to your attention in your capacity as a Council member?

[52] A Yes, it was because it was going into my ward. Actually, if you want to know kind of the background on it --

Q Actually I don't. It being the Lazy 8, the new location of the casino, was to go into your ward and that is the geographical area you represent; right?

A Correct.

Q And that was really the issue, was to whether to approve it for construction in your ward, was it not?

A Yes, ma'am.

Q So it was being proposed to be going into your ward in 2005 when it came to your attention?

A That's correct.

Q Now what did you do then in response to this proposal to determine the tenor of your constituency's response to that proposal?

A Like I said, I was telling the Vice Chairman, I was in a really great position because during that time I was running a re-election. And I got to knock on doors, and that's all anybody wanted to talk about. So when I knocked on their door, my first question was, hey, what do you think about the Lazy 8? Because I represent ward -- I'm sorry, go ahead.

Q Let me stop you really quickly because you have just told me that you learned about the proposal [53] about a year before the election.

A Correct.

Q Were you campaigning for reappointment or re-election in 2006, a year before that election took place?

A Actually, no.

Q So let's say your election in that year was in November, was it not?

A Correct.

Q So when approximately did you become aware of the proposed location of the Lazy 8 project?

A That was a year before.

Q And did you do anything to take the temperature of your constituency at that time before you started campaigning?

A I started to take -- actually that's why I want to go into a little background.

Q All right.

A They have a floating gaming license, and they could have put up a stand-alone casino, and the people in my ward did not want that. So I took it upon myself to go talk to Harvey Whittemore and say, look, you are never going to get this thing passed in the constituency of Sparks if it's a stand-alone casino.

I had also talked to the Nugget. The Nugget [54] told me we won't oppose this project if they build a 200-room hotel because we're on a level playing field. They later went back on their word, by the way. They said it on the record, and then they said it on

the record that, well, yeah, but now we're opposed to it.

But I went out there and said, look, if you build this, as a retail commercial area with more product to it, that's what the constituency of Sparks would like. The Nugget won't argue about it. So that is what I did up until I started knocking on doors.

Q At what point in your knowledge did Mr. Vasquez become involved with the Lazy 8 project?

A You know, you would have to ask him when they hired him. I don't know. But it had to do -- it was sometime between that summer and the next summer.

Q And when did it become known to you that your former campaign manager for two campaigns and personal friend, to an extent, was a part of this very contentious issue in your ward?

A Well, he called me up and said that he was hired by Harvey Whittemore. But he has a lot of other things he does. This is just one of them.

Q Okay. When you were talking with Mr. Whittemore and trying to figure out how to keep everybody happy, my characterization of your testimony [55] with regard to the Nugget and other large players in this game, was that a political discussion? Were you trying to balance the interests or were you -- what was your intention?

A My intent was to get the best product for the City of Sparks and my citizens, and my constituency were telling me what they want and I was trying to do that.

Q When you say that your constituency, your voters were telling you what they wanted, how was that communicated to you other than during the campaign?

A Telephone calls, e-mails, face-to-face, supermarkets.

Q So you had in your mind how you felt or how you intended to vote after considering all the information with regard to the Lazy 8 project well before Mr. Vasquez became involved?

A If all those pieces fell into place I was going to vote for the project because that's what 70 percent of the people I was talking to or more than 70 that I talked to, it turned out, I guess I could say 62 percent since that's how many points I got re-elected. Yeah, that's my intention.

Q So when Mr. Vasquez called you and said he was just hired, did anything run through your mind about, gee, I wonder how that might affect my opinion or my [56] actions with regard to Lazy 8 as a Council member?

A No. I have known Carlos for a long time. He has never ever asked me for anything. And so I didn't think he was going to start.

Q Did he at any time make it known to you that if this project went through, he'd have a boon to his business?

A I asked him -- I did ask him, I said, if this thing goes through or fails, does it matter to you financially. He said no. He was on a contract and --

well, and the good example is he is still working for him.

And you have to remember, in August of 2006, this thing failed. In other words, the City Council voted against it, and he didn't get fired. So I guess the answer to your question would be it didn't matter.

Q Now earlier in the questioning that I believe Commissioner Hutchison was going through you stated that you wanted everybody to know that Vasquez wasn't getting paid.

A Correct.

Q Why?

A Because I didn't want -- I'll give you a quick background for me. I graduated from the Naval Academy. We have an honor code that says you won't lie, you won't cheat, you won't steal, and [57] you won't tolerate anybody that does. And that's been ingrained in me.

I wanted to be above board with everything because I didn't want somebody to come back and say, oh, somebody got you elected, now you owe them something. And that's just in my character. That is one of the reasons I told Mr. Flangas, I don't care what questions you ask me because in my mind, I have done nothing incorrect and I'll answer anything you got.

So I just -- I'm above board on everything.

The other thing is when I was in the military I had a top secret clearance, I was cleared for the

ridiculous. I have probably 10 background checks on me. So my family is very used to people coming over and asking about us. I mean, my life is an open book. I mean, I have had my finances checked, my background checked ten times by government.

Q And Councilman, I want to assure you that I don't mean to infer that you have done anything wrong or right in this instance.

A Ma'am, I just wanted to let you know where I came from. That is why I wanted a report. That is why every single time I have a campaign disclosure report I report everything, in-kind. If he and I talk about something, to me, that is a consultation and I'm going to [58] report it.

Q Okay. Is it your -- I mean, is it typical in City Council races that, in your opinion, that the campaign managers don't get paid?

A You know, this one, I'm not sure. You can ask Carlos about it. I know he's run a couple or helped with a couple campaigns. I think he even helped with Kenny Guinn's campaign, and I don't think he got paid for that either.

I don't think you are -- what he does isn't for money. I think he does it for the love of the game.

Q My question really goes to whether there was any special provision of services to you even if it wasn't for compensation, so to speak. In your experience, that's typical?

A I think with Carlos it's typical. There may be some other campaign, run campaigns that get paid for it, but for him I think he does a lot of it for free.

Q Why did you go to your attorneys and ask for advice about disclosure and abstention as it related to the Lazy 8?

A Because Carlos got hired by the company that owns the Lazy 8 project. I asked our City Attorney for an opinion because I wanted to make sure that it was legal and proper for me to vote. So before the [59] election -- excuse me -- before the vote I asked our City Attorney for an opinion because I wanted to make sure that everything was out in the open.

Q What in your mind was the concern?

A My concern was I did not want somebody to think that I was voting in a certain way because Carlos is a friend of mine.

Q Have you ever asked the City Attorney for a similar opinion regarding any other vote?

A Yes.

Q I don't need to know what they were. And have you a history of abstaining from votes? In your recollection of your service on the Council, have there been significant number of disclosures and/or abstentions?

A I abstained once.

Q And have there been more than one disclosure?

A I disclosed -- no, I abstained once because of something that happened. I never had to make a disclosure because nothing has ever come up that I had to disclose.

Q But in this event you disclosed your relationship and then did not abstain from voting?

A I did not. And the reason I did that, if you want to know, is because with my attorney's advice, he [60] went over the NRS with me, and basically said if you don't have any financial dealings, if you don't think you are giving anybody a privilege that you wouldn't give any other citizen, and you think that you can vote, then you go ahead and vote. I properly disclosed.

Here is the interesting fact. The next day after I disclosed, we were on three channels, TV channels and in the newspaper as breaking news, they said this is breaking news. I said it the night before. So it wasn't that breaking.

I mean, you know, I admitted that he was a friend of mine, and I laid out the disclosure exactly like the City Attorney gave it to me. And then I said I'm going to vote on this, I'm not going to abstain.

And I have to tell you why another reason. My citizens, I represent 87,000 people. If you keep abstaining every time, I'm not doing them any good, and I'd quit if I had to do that.

COMMISSIONER JENKINS: Thank you, Councilman.

I don't have anything further at this time. I'll give someone else a chance.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Jenkins. Other Commissioners?

Commissioner Hsu. Commissioner Cashman, go right ahead.

[61] EXAMINATION

BY COMMISSIONER CASHMAN:

Q Thank you, and good morning, Mr. Carrigan.

A Good morning.

Q Councilman. You indicated to us that you are career Navy, I believe?

A Yes, sir.

Q What was your final rank? Can you give me a brief synopsis of your career?

A My final rank was commander. I was in the Navy for 24 years. And I was a naval aviator, and I have a subspecialty in intelligence.

Q That would explain your top secret clearance.

A Yes, sir.

Q You retired in 1993, you said?

A It was actually January 1st, 1992.

Q What did you do after that?

A After that I went back to the University of Nevada, Reno, and got a Master's Degree in journalism.

Then I went to work for a newspaper for a while, and then in 1997 after I received my Bachelor's Degree, University of Nevada, Reno, asked me to be

an instructor part time. So I teach media writing and ethics.

Q Do you still work for UNR today?

A Yes, sir, I do.

[62] Q Explain a little bit more to me how you decided to get into politics.

A Actually it was my wife. I had been retired out of the military, and the same reason I got into journalism because I didn't like journalists, because I didn't like the way they did some things, so she told me to get a degree and try to change it. Our City Councilwoman was not running again, and I said -- I was making a comment at dinner one night and said, boy, whoever gets elected, I hope they know what's going on. And I kept going and going. And because of my military background I follow politics a lot, and my wife said, well, if you think you can do a better job, why don't you try.

So I picked up the phone and said, Carlos, would you like to run my campaign, and that was seriously about two weeks before the filing date.

Q That was the beginning of your conversation with Carlos as it relates to the campaign there? You hadn't discussed with him in the previous to that running or politics or being elected or anything along those lines?

A No, sir.

Q I think it's fair, and tell me if this is true or not, that Carlos has been your campaign manager

[63] for your three campaigns and he is your primary political advisor?

A Yes, sir.

Q I think you said that he was instrumental in getting you elected in the first go round, and maybe so; is that correct?

A He was instrumental in all three elections.

Q Did he give you any political advice regarding the Lazy 8?

A No, sir, he did not.

Q You had indicated that he was a political advisor, and then I think to a subsequent question maybe that changed a little bit. Can you go into the background of political advice and the kind of advice that he has given you over the past seven, eight years?

A You know, I wouldn't say it was as much advice as it was we'd talk about certain issues. And we'd kind of work it out and say where are we. It's very rare that we ever talked about -- we never talked about anything that he worked on at all. In other words, if you are asking did he come up and say I'm working on this project and this is what I think you should do politically, he has never done that.

Q Did you ever bring issues -- and you have already answered the question relative to the Lazy 8 – [64] but did you bring -- politics are full of thorny decisions and thorny issues. Did you ever go to him and talk through the relative merits of particular

decisions and things as one might expect you would with a political advisor?

A Yes, on certain issues.

Q Relating to the City?

A Relating to -- yeah. I'm trying to think of some specific to give, and I can't think of any right now.

Q But nothing specific to the Lazy 8?

A Nothing specific to anything he's done in the city.

COMMISSIONER CASHMAN: I think that's all my questions for right this moment, Mr. Chairman.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Cashman. Commissioner Hsu.

COMMISSIONER HSU: Thank you, Mr. Chairman.

EXAMINATION

BY COMMISSIONER HSU:

Q Good morning, Mr. Carrigan. Thank you for your patience during this proceedings. I want to try to put your testimony in context of some of the documents that we have been presented as exhibits.

Let's start with the Commission's exhibit [65] book. Do you have the materials in front of you somewhere? It would be the green hearing exhibit book, if you have that.

A Yes, sir, I have it.

Q And then you will notice that there's Bates stamp numbers on these documents. So if you go to Tab 2, and the Bates stamp 52. Are you there?

A Yes, sir.

Q And this is a letter -- it goes to the following page, but it is a letter that you signed; right?

A Yes, sir.

Q I guess there is no date on it. But it is a letter to Patrick Hearn, who was the Executive Director of this Commission, just so we are clear for the record.

But anyway, if you could go to the fourth paragraph where it says, "First, my business relationship with Mr. Vasquez is neither 'substantial' nor 'continuing.' My friendship with Mr. Vasquez can be so characterized, but not my business relationship."

Do you see that?

A Yes, sir.

Q And this is an accurate statement?

A That is very accurate.

[66] Q So the way I read this, then, is that you are saying you don't have a substantial business or substantial and continuing business relationship with Carlos Vasquez, it's intermittent because you only do campaigns every four years or so; would that be fair to say?

A That is fair.

Q With respect to the business relationship you have with Mr. Vasquez, you testified earlier that Carlos never got paid for managing your campaign.

A That's correct.

Q And do you know if that's basically his practice for all campaigns?

A You will have to ask him that. I'm not sure. I think I only know of one other one that I know he worked on the Governor's campaign, and I know he didn't get paid for that.

But you know, when you say business, to me it means that money goes back and forth. I really couldn't consider even when we run campaigns as a business relationship because there isn't any money involved.

Q Okay. So would it be fair to say that because there is no money involved where he gets paid from your campaign, that he is doing this based on his friendship with you?

[67] A I would say that is probably correct.

Q He doesn't have a substantial and continuing business relationship with you, but he would have a substantial and continuing friendship with you?

A That's correct.

Q Accurate statement?

A It is. I think that is what it says in there.

Q I just wanted to make sure.

A No.

Q I understood what you were saying there.

A I didn't mean to be derogatory. That's correct.

Q This friendship really took off in 1999 with the first campaign that Carlos worked on; right?

A Yes, sir.

Q I wanted to try to get a little bit of a flavor of that. You said you went to -- do you still go to dinners regularly?

A Not regularly. But we still go to dinner.

Q When is the last time you have gone to dinner?

A I'm trying to remember. A month ago maybe.

Q Do you have dinners at your home? I mean, do you guys go to each other's homes and visit family?

[68] A Generally it is go out to dinner.

Q Is it with family or is it just you two alone generally?

A Generally it's with family. So it's my wife. And he's been divorced recently. So his ex-wife doesn't come any more.

Q But previously when he was married, you would have dinners as a family?

A It wasn't that. She was basically raising children, so we didn't get out very much at all. We would be lucky if we got out once every six months to go to dinner only because everybody was too busy.

Q I guess where I'm getting at, were these dinners that you would go out with Carlos Vasquez, were they more social in nature?

A They were totally social.

Q So it wasn't necessarily to talk politics?

A You know, if you have been in politics eight years like I have, my wife doesn't want to hear any more about it when we go out to dinner. So we kind of have a pact if we go out to dinner you knock off talking about politics.

Q How about -- I mean, these are kind of maybe nitpicky questions, but I want to get a better idea. Like, for example, you have a cell phone; right?

A Yes.

Q Do you have Carlos on speed dial?

[69] A Yes.

Q It would be because of your friendship with him?

A Yes.

Q Have you ever referred business to Carlos?

A No.

Q In 1999, when he served as your campaign manager, do you know if Carlos was also in the lobbying business?

A In 1999?

Q Yes.

A I think he was.

Q You think he was? But you are not sure?

A I'm not sure. I really didn't know -- I didn't get into his business at all prior to that.

Q So at any point during this relationship from 1999 forward, did you become aware of more particulars with respect to some of the lobbying activities Carlos might be engaging in?

A Yes.

Q Can you give me a ballpark of when you started wondering about that?

A I think probably after I got elected. And [70] then I was plugged into the political arena. So you go to different things and hear different people talk.

Q After you got elected were you aware of Carlos engaging in lobbying activities on certain matters that went before the Sparks Council?

A He never come before the City Council. I think he did it before I got there, but since I was in 1999 on the first thing he brought forward, in other words, I guess one of his clients or whatever you want to call it was Red Hawk Land, and then later on he has another client that came in.

Q So the first client, so to speak, of Carlos that you were aware of that was coming before the City Council was Red Hawk Land, and that's essentially the proponents of the Lazy 8 matter; right?

A Correct.

Q And that would be in 2005, 2005 time frame?

A Yeah, I knew about the Lazy 8 before he got hired by Red Hawk Land because it was coming before the City before that.

Q Thank you. I want to switch directions real quick just to clarify the record and my own mind. If you could go to Tab 7 of the green book and Bates stamp 152. I'm sorry, Bate stamp 150. I just want to clarify things.

[71] Are these campaign contribution reports relating to your 1999 campaign? That would be fair to say; right?

A Yes.

Q If we look at No. 1, Bate stamp 150, about the in-kind contributions, there is an entry for Carlos Vasquez, Laurie Vasquez and Electrographics. Do you see that?

A Yes, sir.

Q Again, they are in kind. I think I remember hearing you testify that it was basically consulting time that was being reported as in kind.

A Correct. And then there was Electrographics is I think it was another designing the logo signs and all that.

Q Owned by the Vasquez family?

A Yes.

Q So when you look at that first entry Carlos Vasquez at $2500 of in-kind contributions, that would be based on your conversations and consulting?

A Again, we listed all of our conversations or consultations.

Q So then when you get to the next entry of Laurie Vasquez, and as you heard my disclosure, I represented Laurie Vasquez, who is his father -- are you [72] aware of that?

A I am aware because his office was right next to Carlos at the time. And that once again, Laurie sat in on some of our campaign strategy, and so I wanted to list it.

Q And that is why he has a separate entry because he provided some kind of time?

A To the best of my recollection, that is why we did it that way.

Q And then as you have indicated, Electrographics is a company of Carlos Vasquez?

A Right.

Q And again, that was the in-kind contribution, there was some graphics?

A I think it was some printing and graphics.

Q Then there is also somewhere in these documents another company called Art Associates.

A Correct.

Q And that would be another -- was it a printing company?

A I think that is the advertising part of the company.

Q So just to distinguish for the record, there are two companies, there is Electrographics, which is print?

[73] A I think you can ask Carlos. I'm not sure. I think it is more they do design graphics.

Q And then there is the Art Associates which is the advertising?

A I think it is on the advertising. But once again, please don't hold me to that.

Q I'm trying to get your understanding, if you have an understanding about the difference between those two companies.

A Yes, I understand they are two different companies.

Q Now if you could go to Tab 2 of the green book, and Bates stamp 69. Do you see that? It is a memorandum from the City Attorney's office to the Mayor and Sparks City Council members?

A Yes.

Q Dated August 17, 2006?

A Yes, sir.

Q Now do you know what prompted the City Attorney to write this memo?

A I do. I asked for it, an opinion.

Q So it was you and not other people?

A No. It was just me.

Q It was with respect to the issues that we have been talking about today; right?

[74] A Yes, sir.

Q Your concern about having a relationship with Carlos Vasquez?

A Correct. And I wanted to make sure that I was okay to vote on it, so I asked for an opinion.

Q Based on your review of this legal memorandum, you acted accordingly?

A Yes, sir, I disclosed before the meeting and basically came out with the disclosure that said now that I have disclosed and, you know, kind of like what you did today, and said that I still can vote on this because it has not swayed me. And really the last, second to the last paragraph is the one that really kind of says it all, that it says, and this is out of your own --

Q On page 71 are you looking at?

A I'm looking at 71, the second paragraph. It says: "The Nevada Ethics in Government Law further provides that if a financial or personal detriment or benefit which accrues to a public official is not greater than that occurring to any other member of the general business," you can vote on it. And I felt that I wasn't any different than anybody else. So that's part -- that was part of the reason.

But if you read the entire -- it is kind of a [75] long opinion.

Q You read this pretty closely?

A Very closely.

Q So if you look at the last paragraph, for example, where it says, "For the foregoing reasons, it is our opinion that prior statements of position on an issue of public importance by either a candidate or by an elected official do not require disqualification of that individual at a time the individual is charged with deciding upon the issue."

I read that correctly; right?

A Yes, sir.

Q And is it your understanding based on that sentence I just read that -- actually let me rephrase that. Was the issue your relationship with Carlos Vasquez, or was the issue prior statements on a public importance? I see a little difference there.

A There is a difference. I asked because of my personal relationship with Carlos.

I also asked because whenever a City Councilman made a statement earlier in the year that he didn't care where this thing was going, he was going to vote no on it. And so that's why the City Attorney came up with this other part that said prior, I think prior [76] admittance is not bias.

Q And I understand that part of it. I mean, politicians will say certain things.

A Correct.

Q You are not acting as judges, you are acting on things of certain public --

A That was his opinion, and I'm sure that he had a good reason for it, just like I had a reason to vote for it. He thought he had a reason to vote against it, and that is why we get elected is to make those decisions.

Q With respect to the opinion on predisposition or prior opinions, that really wasn't something that you were concerned about?

A No, sir. I was only concerned with my personal relationship with Carlos and if there was -- whatever the opinion was. And whatever the opinion from the City Attorney I was going to follow. If he said you need to recuse yourself, I would have recused myself that night.

Q So if you go to the next sentence that we just read in the last paragraph, "The only type of bias which may lead to disqualification of a public official must be grounded in facts demonstrating that the public official [77] "stands to reap either a financial or personal gain or loss as a result of the official action."

Do you see that?

A Yes, sir.

Q I read that correctly?

A You did.

Q And is that a sentence that you took note of?

A Yes, sir, I did.

Q And then when we go into the actual, your actual disclosure, we have both minutes and

apparently a transcript. What I want to do is get you through the yellow exhibit book, which is exhibits presented by the City Attorney's office, and go to Tab K, and Bates stamp 62. On the top of that -- this purports to be a transcript. It says, "Mike Carrigan Disclosure." Do you see that?

A Yes, sir.

Q And then there is what appears to be you being quoted verbatim. Can you look that over and tell me whether or not this is an accurate reflection of what you disclosed on that day?

A Yeah. I told our City Attorney -- I don't remember saying all the "uh's" in there.

VICE CHAIRMAN HUTCHISON: None of us ever do.

[78] THE WITNESS: Did you all notice that, too? But yes, that is. It was written out for me and I read it verbatim. I added my own "uh's."

BY COMMISSIONER HSU:

Q Again, when you look at some of the language it says, "I do not stand to reap either a financial or personal gain or loss as a result of any official action." Do you see that language there?

A Yes, sir.

Q Was that directly from the legal opinion that you -- that we just read from the City Attorney's office?

A This was directly from the City Attorney that printed this up for me and told me to read it.

Q So did the City Attorney actually provide the written or draft this disclosure for you?

A Yes, sir.

Q With respect to this disclosure, we now know about your friendship, your substantial and continuing friendship with Mr. Vasquez. I'd like to kind of pose some hypotheticals in your mind. Let's say it wasn't Mr. Vasquez. Let's say it was your father who was the lobbyist for this project.

Would you have felt internally a need to abstain?

A Yes, sir.

[79] Q And why?

A Because, well, first of all, it's your father, and according to the ethics rules in the State of Nevada, that if you disclose that he's your relative, this isn't going to sway me. I would think that any reasonable person thinking about it would say that anybody that is in your household, unless it is your sister, would sway you. So I try to take the high road. If it would have been a relative, I would have stepped down from voting.

Q You joke about your sister, but if it was really your sister --

A It was, and I just made a joke.

Q I just wanted to make sure that --

A She doesn't live in this state either. So I can say that.

Q Okay. I mean, let me ask you this with respect to your relationship with Carlos Vasquez. I mean, he is a pretty close friend of yours now; right?

A Yes, sir.

Q I mean, close enough of a relationship like a brother?

A I wouldn't go that far.

Q Why not?

A Because he's -- we don't have that close of a [80] relationship.

Q Do you have a brother?

A No, I have a sister.

Q Who lives out of state?

A Who lives out of state.

Q Do you socialize with your sister?

A As little as possible, but yeah, once in a while I do.

Q Okay. I mean --

A No, I understand.

Q You confide on matters with Carlos Vasquez, do you not?

A I do.

Q And you confide in matters that you wouldn't normally confide with your sister on?

A Correct.

Q And I appreciate you being honest about this. I mean, I know this is a very difficult process here, and unfortunately, we're here to really look at what the laws require us to.

A I understand. I just kind of get confused on why I'm here. If somebody asked me the question I can explain that.

Q With respect to the Lazy 8 project, you said Carlos never talked to you about that issue, or the vote?

[81] A He never lobbied me at all. But the opposite is not true.

Q Meaning what, you talked to him?

A Meaning I went up to him and I said, if this thing is going to pass, this is what we need.

Q So you were basically advocating a City's position communicating through Carlos as to what --

A Before Carlos got in I was communicating with Harvey Whittemore. When Carlos came in I found it easier to talk to him.

Q And you were saying -- what was the nature of what you were telling him?

A The nature of what I was telling him, a stand-alone casino was not going to work, in my city. Because we didn't want it. The constituency didn't want that. What they did want is some entertainment.

So if you take a look at the evolution of this project, it started off as an 18,000-foot stand-alone

casino, and it is now a 300,000 square foot entertainment area that has a 14-screen TV -- or a 14-screen movie theater, 5 restaurants; made it so you can't come from the casino and go anywhere else, you either have to come in and out of the casino, because that is what some of the citizens wanted. In other words, they didn't want to be able to walk from the [82] casino to the movie theater because of kids.

They acquiesced to all of that. We asked for $300,000 for them to donate for affordable housing, and we asked them to build us a 7400 square foot public facility for either a police substation or a fire station.

We also asked them to move a road and to buy some land behind it so we could square away the roads in Sparks. Somewhere along the line that project went from whatever it was going to be to about $50 million more because of what I asked to be put into it.

So if you want to go over reverse lobbying, in other words, they started off a certain level and they ended up with 50 million or more because of what I asked them to put into it.

Q Why did you feel it was your role to be asking this as opposed to the City Manager or City staff, the Mayor or someone else?

A Because the entire project was going in my ward, and that's the -- well, it was in my ward.

COMMISSIONER HSU: Thank you, Mr. Chair. I don't have any other questions at this time.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Hsu.

We have talked about various exhibits. [83] Counsel, let me just make sure just for the record that we have these exhibits admitted. Do you have any objection to admitting the exhibits that are marked NCOE, Nevada Commission on Ethics exhibits, or obviously, your own exhibits?

MR. THORNLEY: No, Mr. Vice Chair, we don't.

VICE CHAIRMAN HUTCHISON: We will go ahead and admit those into the record.

Are there any further questions of the Councilman by any other Commissioners? Yes. Commissioner Capurro, please.

EXAMINATION

BY COMMISSIONER CAPURRO:

Q I just have a question. I'm not a lawyer.

A There are three of us here, then.

COMMISSIONER HSU: Four.

BY COMMISSIONER CAPURRO:

Q In hindsight, would you have done anything different regarding the charges that have been filed against you and the way you have handled this matter?

A Absolutely not. One of the things you have to look at is these five people that filed ethics complaints against me, which was in my opinion a political move to try to get me out of the office. If the

citizens of Sparks thought I did anything that was [84] inconsistent, I wouldn't have gotten 62 percent of the vote because you have to remember, this incident happened in August. There was a primary right afterward and a general election in November. And I won re-election. So 62 percent of the people in Sparks obviously thought that I was doing a good job.

COMMISSIONER CAPURRO: That is all I have.

VICE CHAIRMAN HUTCHISON: Let's go ahead and take a quick break. Commissioner Cashman.

FURTHER EXAMINATION

BY COMMISSIONER CASHMAN:

Q Thank you, Mr. Vice chairman. I have a follow-up to a question that Commissioner Hsu asked.

You indicated that you did significant reverse lobbying, if you will; is that correct?

A That is correct.

Q First through Harvey Whittemore and then through Carlos?

A Yes, sir.

Q How many conversations would that have been?

A I think I had two conversations with Harvey Whittemore before, and after that with Carlos probably maybe two or three. I don't think it was more than that. I laid out what we wanted, and this was about it.

Q Did he ever come back to you and say, boy, [85] you are really asking for the moon here, we can give you X but not Y and you know how much money this is going to cost us?

A Oh, yeah. He whined a lot.

Q In your mind, is his whining or his feedback to you lobbying?

A No. I think it was just whining.

Q I mean, in the give and take --

A In the give-and-take part of it they didn't take anything back. In other words, I said this is what we need and they said okay.

Q I'm having some trouble, because you have made a representation that Carlos never lobbied you on the project.

A Correct.

Q Yet there was substantial conversation between the two of you regarding the project, in which case you just indicated that he had feedback, and in my mind, any time that feedback occurs, that's lobbying.

A Oh, okay. Well, to me, lobbying is if he came up to me and said, look, I would like you to vote on this project and this is why I want you to vote on it. To me, he was just responding from the people that own the property on what I had told them that I wanted. And basically it wasn't really a give and take. It was more [86] of a they took. We didn't give anything, they took it all. And I did that. Not to say this is the first time that I have ever done that.

One of the things that a lot of people don't understand is when a project first comes in front of a city, it's probably a hundred percent of the time I would say never approved by the way the person puts it in. So there is a lot of things happen in the background, and if you are part of Summerset, you know exactly what I'm talking about.

Q There is a lot of negotiation. There is no question about that.

A And maybe I should qualify that as not lobbying but negotiation. Is that a better word?

Because I guess from my point of view, I was pretty hard lined with what we needed. So I'm not sure if that is the way -- I never lobbied before, so I'm not sure if that could be defined as lobbying. But that's what I told him we needed.

Q Would it be fair to say that at that time when you were having the conversations prior to the vote, that Carlos understood, either you told him or otherwise or maybe you had already formed your opinion based on what your constituents had thought that if you do this for me I will vote for the project?

[87] A That is a good question, and I could tell you that I was following more of what my constituency wanted me to do more than anything else. I got part of that from them, and so I guess the answer would be yeah. If they put that in there, and that would make my constituency happy, I would vote for it.

COMMISSIONER CASHMAN: Thank you. No further questions.

VICE CHAIRMAN HUTCHISON: Commissioner Jenkins.

FURTHER EXAMINATION

BY COMMISSIONER JENKINS:

Q I really like this format because I get to take many bites at the apple. In court you only get one, and this is really much better.

Councilman, when you first went to your attorneys for advice about whether you should participate in the Lazy 8 discussion, were you aware that you could come to this Commission for a confidential first-party opinion request?

A You know, I have read the -- there is a little pamphlet that the Ethics Commission sends out, and one of the things it says in there, if you are confused, look for your attorney, if you have a personal opinion, to ask them for your advice.

[88] So to answer your question, it was my understanding that if I asked for this from my City Attorney, if he had any problems, he would ask the Commission if he had any legal questions. So the answer to your question is I didn't come to you because we have a good City Attorney and good Assistant City Attorneys. That is the reality of it.

Q But were you aware that you could come to us for advice in addition to going to your attorneys?

A Yes.

Q And you chose not to do that at that time?

A I did because I thought my City Attorney had already done that. If you look at some of the things that he wrote in his opinion, he quoted some of the Ethics Commission rules and regulations.

Q Stuff.

A Stuff.

Q Got it. And after you received the opinion, the August 17th I think opinion from the gentlemen who flank you today, who did you ask to write out your disclosure for you?

A Mr. Creekman.

Q And did he do that?

A Yes, he did.

Q So the disclosure you read into the record [89] that was reflected in the transcript was written by your lawyer, Mr. Creekman?

A Yes, and he also sent out an e-mail right before we voted to say don't forget to disclose if you have anything to disclose.

* * * *

[93] BY MR. THORNLEY:

Q Councilman Carrigan, has Sparks grown since 1999?

A Yes.

Q How much?

A I think we grow at a rate about 4 percent a year. I think in 1999 it might have been 50,000 people and we're up to 87,000 now.

Q With that change in population, have the elections changed in that time?

[94] A Yes.

Q How so?

A They have gotten bigger, and especially since we're on the November ballot now.

Q You say they have gotten bigger. What do you mean by that?

A Well, we have more voters to reach. So in other words, there is more registered voters.

Q Would it be fair to say that as they have gotten bigger they have become more expensive?

A Yes.

Q Why have they become more expensive?

A Because in order to get re-elected nowadays you have to advertise. And so advertising fees generally go up during an election year, and so it's more expensive to get the word out.

Q Earlier you told us that you campaigned longer in 2006 than you did in 1999. Why did you feel a need to do that?

A Because they moved the primary election back, and so it made it a little bit longer of an election year.

Q Now each time you run for election Carlos has served as your campaign manager; is that right?

A That is correct.

[95] Q Did you ask him each time?

A Yes.

Q Why?

A Because I didn't think he was going to volunteer.

Q So is it your testimony that it was not understood between yourself and Carlos Vasquez that Carlos would represent you in each subsequent election?

A No, I think he dreaded the phone call every four years.

Q Councilman Carrigan, are you subject to term limits?

A Yes.

Q Are you able to run for City Councilman of Sparks again?

A No, I'm on my third term, so I'm termed out.

Q At the August 23rd, 2006, meeting of the Sparks City Council, did you disclose your relationship with Carlos Vasquez?

A I did.

Q Did you disclose your friendship?

A I did.

Q Did you disclose that he was your campaign manager?

A I did do that, too.

[96] Q At the time you made that disclosure did you believe that you could faithfully and impartially discharge your duties as an elected official?

A Yes.

Q We have talked in detail about campaign contributions that Carlos made to you; is that right?

A Yes.

Q Did you report every campaign contribution you received from Carlos in a complete and timely fashion to the Secretary of State?

A Yes, I did.

Q Have you ever accepted a gift from Carlos Vasquez?

A Yes, I have.

Q What was it?

A Before I got to elected office he gave me a model of an airplane I used fly.

Q Why did he give you that model?

A Because he thought it was kind of a neat gift.

Q Have you ever accepted a loan from Carlos Vasquez?

A No.

Q Do you measure your relationship with Carlos Vasquez by the amount of time he's donated to your [97] campaigns?

A No.

Q Has Carlos Vasquez ever contributed any type of cash to your campaigns?

A No, he has not.

Q Do you have a financial interest in the Red Hawk Land Company?

A No, I do not.

Q Are you affiliated with Red Hawk Land Company in any way?

A No.

Q Do you have any financial interest in the Lazy 8 project?

A No, I do not.

Q Is Carlos a member of your household?

A No.

Q Is he related to you by blood?

A No.

Q Is he related to you by marriage?

A No.

Q Is he related to you by adoption?

A No.

Q Does Carlos employ you?

A No, he does not.

Q Does he employ your wife?

[93] A No.

Q Does Carlos employ either of your daughters?

A No.

Q Do you have a business relationship with Carlos Vasquez?

A The only business relation I have with him is, if you can call it a business relationship, is when we run campaigns.

Q You say if you can call it a business relationship. How do you define a business relationship?

A Well, I'm not a businessman. I was former military. But I always thought in business you were there to make money. So I would say that if you make money or if money changes hands one way or another, then that would be a business relationship.

Q But you say that your relationship with Carlos as your campaign manager is not a business relationship. Or at least you wouldn't classify it that way. Earlier you said that each time he ran for election you asked Carlos if he would represent you; is that right?

A Yes.

Q So it wasn't a continuing relationship?

A No.

Q We have discussed a couple times now that you [99] and Carlos had conversations between elections. What types of things would you talk about?

A We used to talk a lot about the military, a lot about the Navy. It's interesting right now because my classmates from the United States Naval Academy are in every key position in the United States Navy, first time since 1944. By the way, the CNO is a classmate of mine, and all the fleet admirals. We talked a lot about local, national politics and state politics.

Q How did you vote on the Lazy 8 project?

A I voted to approve the Lazy 8.

Q What did you base that vote on?

A I based that vote more on what my constituency was telling me to do.

Q Did you ever receive any legal advice as it pertained to the Lazy 8 matter?

A Yes.

Q What was that?

A Well, it was the opinion from our City Attorney whether I could vote or not vote on the issue.

Q Did you ever receive any legal advice as it pertains to the project itself and not whether or not you could vote on the issue?

A Yes. Well, before any project comes before a city council it always has a legal stamp on it. So we

[100] did get a legal vote. Some of the questions were could they legally move it from one place to another and things like that. So yes.

Q What was the advice of the City Attorney in that case?

A The advice from the City Attorney, that they had the legal right to do what they were trying to do.

Q Did that influence your vote in any way?

A Yes, it did. One of the things is if it is legal to do, and according to NRS, if you are going to vote no on a project you have to stipulate why you are voting no. And I could not find any reason through the NRS to vote, to legally say no to the project.

* * * *

[101] CARLOS VASQUEZ

called as a witness,

was examined and testified as follows:

EXAMINATION

BY VICE CHAIRMAN HUTCHISON:

* * * *

Q * * * *

[102] Now why did you perform your campaign management services for no fees for the Councilman?

A A couple reasons. Primarily being which is that we have been long-term friends. Mr. Carrigan and his wife and my wife at the time worked

together in 1991, and we got to know each other very well, became friends, and when Mike decided he wanted to run for office, I believed he would be a great candidate and he would be a great Council person.

And I have been involved politically, Mr. Chairman, my whole life. I walked houses for Ronald Reagan's first campaign when I was 11 years old. So politics has always been a part of my life.

I donate my time to a variety of candidates, not just Mr. Carrigan, and I have virtually from middle school on. So it was not unusual or unique for me to do [103] so.

But I did so because I believed in Mr. Carrigan as a political candidate and as a City Council person, and I thought that the City needed some help at the time.

Q Since 1999, have you served as campaign chairman for any other candidates or politicians?

A Oh, sure, absolutely.

Q How many? I'm not talking about working on their campaign. I'm talking about campaign chairman, chair their campaign -- or manager. Sorry.

A I was just going to say, there is a big difference between chairman and campaign manager.

Q Campaign manager. The same position that you provided services for the Councilman. How many other candidates between the Councilman have you served in that position since 1999?

A I can't be accurate in the number without actually sitting down and writing it down. Since '99? 50, 60.

Q You served as the campaign manager --

A Yeah.

Q -- for 50 or 60 candidates since 1999?

A Uh-huh.

Q Have you been compensated for any of those [104] services?

A Some of them, yes, and some of them, no. It depends on the office and the candidate and what my role is.

Compensated, Mr. Chairman, and I don't want to step on anything here, but I own a couple of firms that provide services for these candidates. So when you asked me if I'm compensated, I'm assuming that if my printing company or my ad agency is compensated, that that is compensation.

In terms of compensation for actually managing the campaign as a campaign paid manager, very seldom has that ever happened for me. Usually I'm involved with campaigns that don't have those kind of resources. So no.

Q So how do you make your living or how have you made your living since 1999? Would you consider your political consultation services to be the source of your living since '99, or do you have another source?

A No, I have got a variety of different business interests. I own an ad agency, I own a printing company, I own an Internet firm, I own a gym. I own a variety of other things.

* * * *

[108] Q Now in 2006, the Councilman runs. You guys together put together a formidable campaign in what was my understanding to be a very contentious campaign season? Would you agree with that?

A Oh, absolutely.

Q And my understanding is it was contentious because of the Lazy 8 project; is that right?

A Largely so, yes. I think there were other issues that contributed to that also relating to a very organized opponent, well funded by a special interest. But yeah, it was a large part of it.

Q And then you continued on and up until the August 23rd meeting that we have been speaking about here today continued on and worked for the Lazy 8 project in the capacity that you just described; is that right?

A Yes. And it isn't fair to -- well, I just want to disclose, I have other responsibilities for Wingfield Nevada outside of Lazy 8. So it isn't my primary and only focus for them.

Q So you have extensive business ties, then, to the Lazy 8?

A No. Other than as the public relations, I [109] have no business tie to it. I'm a paid consultant through Wingfield Nevada.

Q And you do a lot of consulting beyond the Lazy 8, is that what you are saying, for the company?

A Other development projects, other things that the Whittemore family is involved with or Wingfield Nevada is involved with.

Q Now did you -- my understanding is that the Councilman actually talked with you about issues concerning the Lazy 8 after the 2006 campaign and before the August 23rd meeting; is that right? I'm trying to kind of narrow some time frames here.

A Yeah. The Council as a whole, each of the different Council people had talked to me at different times about the process, what was happening. We met with them to show them the project to take them through the scope of what we were trying to do.

When you deal with a plan development handbook, the City is very involved in the development of that project, and what you start with and what you end up with can be radically different as you go through kind of that process of working with the staff and then working with the elected officials, because they each have things that they think need to happen for the surrounding neighborhoods, the city and the impacted areas.

[110] Through that process we met with Mr. Carrigan and with all the Council people, and the project evolved enormously. And Mr. Carrigan put some pretty significant changes into this project that ended up costing a lot of money.

Q Right. During the course of your meetings with Mr. Carrigan concerning the Lazy 8, did you

both talk about what would be needed in order for Mr. Carrigan to support the project, needed in terms of characteristics of the project, amenities for the project, how the project would need to be developed? Were those subjects part of what you discussed with him?

A Not necessarily in that term. Each of the Council people, Mr. Carrigan included -- I'll give you a good example. Mr. Carrigan was very up front with us that this project would not have his support unless we built 200 hotel rooms to level the playing field with other properties. That's an easy thing to ask. It is a very, very expensive thing, particularly for a company that already has a grandfathered nonrestricted license that they just bought.

So that was -- and he had already had a previous discussion with Mr. Whittemore about that. So that was something that was presented to us that would have to change or he was not going to be supporting.

[111] At no point in time were we ever assured of Mike's vote or position, but we knew the things we had to change. We knew we had to change that.

We knew we had to build a public building. We were asked for a donation of $300,000 to affordable housing. These were also things that came from different entities at the City demanding that these things be changed.

Mr. Carrigan was very clear our initial design of this project in his opinion was inappropriate for the area. And caused us to redesign the project.

Q Did you at any time ever ask Councilman Carrigan for his vote in favor of the project or that he support the project? Did you ever ask him to do that?

A No, sir. I never asked Councilman Carrigan for his vote on this project.

Q Did you ask Councilman Carrigan for his input in terms of what would need to happen from his point of view to make the project happen?

A Yeah, I asked him for his opinion on what it would take in his opinion to make this more ameliable with the neighbors, what he thought would be -- it is in his ward. So the ward holder, if this project were in anybody else's ward, that is who we would have been spending more time with.

[112] But we met with every Council member. When you do PUD development, whoever's ward you are in has an enormous impact on the project, and it was no different than when we did the Sparks Galleria Mall down the road.

I have been involved with hundreds of these types of projects. And it's always a different council person or a county commissioner. And it you get to understand what it is that they want to have happen in their city and in their community, and you can either bring a project that is inappropriate, it isn't going to be good for anybody, or you can take that input from not only the elected officials but the staff and the public and try and create something that works ultimately.

It's a free market. If you build what nobody wants, it fails, even if you get it entitled. So yeah, we got a lot of input from not only Mr. Carrigan but the other City Council people and an enormous amount from the City staff.

* * * *

[115] Q Now one of the things that we will be looking at today is whether or not you benefited from any vote or action that the Councilman may have taken. And of course, the focus is on the August 23rd vote.

So I'll just ask you directly the question. What benefit did you gain when the Councilman voted in favor of the Lazy 8 project on August 23rd?

A Absolutely none. We lost. So I got absolutely no benefit.

Now my --

Q Now a critic may say or somebody who wanted to be a devil's advocate could say you lost but you also got some yea votes that ultimately have turned into a complete victory for your client. So maybe this was a progress. How would you respond to that?

A Well, I can tell you the night of the 23rd we didn't feel it was a progress.

Q I'm not asking about the night of the 23rd how you felt. What I'm saying is, did you benefit from Council Carrigan's --

A No.

Q -- vote in favor of the Lazy 8?

A No. Mr. Chairman, my role with Wingfield [116] Nevada is not predicated on a win or a loss. I'm not compensated more, I'm not compensated less. I bill either winning or losing. I don't have a win bonus, I don't have any kind of partnership, I don't have a piece of the equity. I'm a paid consultant, and I'm paid the same amount of money win, loss or draw or whatever happens. It doesn't change for my compensation.

* * * *

BY COMMISSIONER HSU:

[133] Q Mr. Vasquez, I just want to clarify. You testified earlier that you get no win bonus, you are a paid consultant, you get the same amount win, lose or draw on the result of the vote on the Lazy 8 matter.

A Uh-huh. Yes, sir.

Q So paid consultant, what does that mean? Is that hourly?

A No, no.

Q Retainer?

A It is a retainer.

Q And so whatever time, extra time you have to put on, you get paid that same amount?

A I do. I get paid that same amount each month. I keep track of my time, I bill back to the retainer and kind of show them where and what I'm doing on a variety of other projects.

My relationship with Wingfield Nevada and Harvey Whittemore and the Peppermill is not just about Lazy 8. I have other things that I work on, other responsibilities. There are other projects. There is a little, bitty one going down by Mr. Cashman I think in [134] Las Vegas, Coyote Springs. So I have involvement in a lot of these other projects.

So I'm paid a retainer to consult on all of those.

Q A global retainer relationship?

A It is. I don't get any bonus, any advantage on Lazy 8. And win, lose or draw with Lazy 8, my situation with my client would not have changed and did not change.

Q And when you say "retainer," is it a retainer to you or to Art Associates to Electrographics? Who is the retainer to?

A The retainer is to my entity Cat Strategies, which is my lobbying and public relations arm.

Q And do you mind if I ask how much that retainer is?

A No, not at all. Not at all. Wingfield Nevada pays me $10,000 a month.

* * * *

[136] Q So I guess, then, the point I was trying to see if -- to explore is whether or not even if you don't get paid more or less on a particular City Council vote, you could potentially lose your long-term financial relationship with the Whittemore family if you start losing with the City Council, if you start having a bad track record, but what you

are telling me is that there is a lot of other things going on and you are on retainer for all that stuff.

A Oh, yes, Mr. Hsu. The Lazy 8 is the thing that gets all the attention and it's the thing -- it is the reason why I'm sitting here. But it isn't what I spend most of my time on for that client. There are a variety of other things.

Currently the King Triple 8 is now taking up most of my time. So it's one of many things.

And the interesting thing about the Wingfield Nevada group is the diversity of business interests they have, from energy drinks to bioceuticals. This casino [137] project is part of that.

* * * *

[141] Q I just have one quick question. We have an exhibit book, there is a green book, and if you could go to Tab 5 on that. It's not something you are going to have -- you would have been familiar with, but I'm going to use that as a basis to ask you a question.

A Sure.

Q Really it is the last sentence there, there [142] is a reference to a $46,000 in campaign expenses regarding your activities on Mr. Carrigan's campaign.

A Uh-huh.

Q It says that this is a total, the 46,562 campaign expense total is a pass through, meaning Carlos Vasquez used this money to pay others for advertising services. Do you see that?

A Yeah.

Q Is that something -- do you agree with that statement?

A Oh, yeah.

Q So just to break that down, pass through to pay who? Advertising? Media?

A Well, we buy media. A lot of that money goes right back to the government in terms of postage to pay the mail houses, to pay the people who make the signs, to pay the guys who sell us the paper. It's all video placement.

In Sparks Council races, Commissioner, I know you are thinking media like in television, Mr. Carrigan only had one campaign that ever had television. Previous to that it was all mail. So the bulk of our expenses were postage and mail house related. And some printing. But the government makes the most money out of all this.

Q Did your companies retain some of that money? [143] You have two companies; right? Or you have more but you have --

A Yes, sir.

Q -- Electrographics?

A Electrographics.

Q That's the printing component?

A Printing company, and Art Associates is our ad agency.

Q Did any of those companies actually take a cut of this $46,000?

A The printing we priced out at a below market rate, we took our profit off of it.

Q Essentially cost?

A Yeah. It was all cost. I never retained any money on any of this. Everything we did for Mr. Carrigan has always been for cost, always. Pass through money. If the postage is $4,500, he gave me a check for $4,500, I wrote a check for $4,500 to the mail house, to the U.S. Post Office and then paid the mail house.

Q Was there an overhead component that you paid your company?

A No.

Q Just costs, pure costs?

A We had some stuff where we had some internal costs that we were trying to cover some of our salaries. [144] But it was pure internal costs, and I could easily display that to you.

Q What does that mean? Explain that a little bit more. Internal costs to cover salaries of who?

A The people working on this stuff. The designers and that kind of stuff. A lot of this stuff is stuff that we don't do in-house, we farm out to somebody, and we pass those costs on to the campaign. We don't do signs, we don't do mailings, and that kind of stuff we had to use vendors for. And we passed those costs directly on to the campaign.

* * * *

[166] VICE CHAIRMAN HUTCHISON: Thank you, Mr. Creekman; thank you, Mr. Thornley.

All right, we will go ahead and close then the receiving of evidence, testimony, comments by counsel, arguments by counsel, closing arguments, and we will now open the Commission for deliberations. This is a process that can sometimes be lengthy and can sometimes be expeditious depending on kind of what the issues are in the case. It's a public body's way of deliberating openly so you can hear what our thinking is.

It may seem like we are ignoring all the rest of you, but we're just talking among ourselves. That is the way the rules are established, and we have to talk and think and reason out loud and then ultimately come to a decision.

* * * *

[171] COMMISSIONER JENKINS: Good, thank you. Well, first I'd like to talk about a commitment in a private capacity to the interest of others. And so again, looking at the statute, it means a commitment to a person who is a member of his household or who is related to him within the third degree of consanguinity, but the Legislature also added any other commitment or relationship that is substantially similar to a commitment or relationship described in (a) through (d). And that means a person who is as close as a member of your household or a person who is just as close as a person related by blood or by marriage, a person just

as close as one with whom one has a substantial and continuing business relationship.

[172] In that capacity, with regard to commitment in the private capacity to the interests of another, I have some issues with both (d), the substantial and continuing business relationship, and (e), that just as close as, my words, provision of that definition.

With regard to the substantial and continuing business relationship, I disagree with the testimony of the interpretation by the public officer and the other witnesses in that one needs to be in the business of making money for it to be a business relationship. I think that perhaps when Councilman Carrigan testified that they wanted to make sure everybody knew that Mr. Vasquez wasn't being paid, that may have been an intention to avoid the definition of a business relationship, maybe directly, maybe indirectly, but we didn't get to that.

And I think that business is business. Business that Mr. Vasquez is in is to provide public relations and advertising services, whether he's paid or not, and but for his in-kind contribution, if you will, those services would have been a business relationship.

So that gives me pause, and I'm not certain where I land with regard to that subsection (d). But we did hear that Mr. Vasquez and Mr. Carrigan are friends and have been friends for years and years, and that [173] may -- that relationship may rise to a definition of just as close as a member of your household, a member of your family.

I found it interesting when Council Member Carrigan referred to his father or someone who lives in his household, he would definitely have abstained, but not his sister. He has two sisters. But when Commissioner Hsu was questioning him about, well, is Mr. Vasquez as close as a brother, his answer was no.

So I'm not certain where I am as far as the affinity or consanguinity, but any other commitment or relationship substantially similar to a substantial and continuing business relationship gives me pause. I hope that I made that clear. Because it is a little twisted.

And in that we might derive that Mr. Carrigan had a commitment in a private capacity to the interests of Mr. Vasquez resulting from their not for compensation but otherwise business relationship.

And I also disagree that starting and stopping every three years doesn't eviscerate the continuing nature of their relationship. Every time Mr. Carrigan ran for office he used the services of Mr. Vasquez. I consider that continuing.

And I also consider it substantial in that Mr. Carrigan's role as a Council member is reliant upon, [174] and he said he's a damn good campaign manager, reliant upon the services provided by Mr. Vasquez.

So the person to whom he has a commitment in a private capacity to the interests of might be Mr. Vasquez with regard to NRS 281.481 subsection (2).

However, there are two pieces of that statute that I find fail miserably, and that is not only was Mr. Carrigan unable to secure or grant those privileges, and I was among the camp that said you just have to attempt to, but I don't believe that those privileges, if you will, were unwarranted due to the resounding support in the ward for the project that Councilman Carrigan concluded from his personal interaction with his constituents. I find that on balance his responsibility to act as a representative in our representative form of government outweighs greatly any privilege, preference or exemption or advantage that might flow to Mr. Vasquez as a result.

So participating in the vote and representing his constituency says to me that any privilege that might have flowed would not be unwarranted. And with that, I would find that there was not a violation of 281.481(2).

* * * *

[192] COMMISSIONER JENKINS: Thank you, Mr. Chairman, Vice Chairman. Our abstention statute NRS 281.501 subsection (2) requires that the Councilman would have voted on a measure with respect to which the independence of judgment of a reasonable person in his situation, not necessarily him, but a reasonable person in his situation, which I would characterize as an elected official, not just a person in the community, would be materially affected by, and I'll skip to his commitment in a private capacity to the interests of others. And it's there that I should have been telling all of us the

story of the relationship similar to a [193] substantial and continuing business relationship.

So I won't go through that again, but my take on the facts that were presented in the materials and today is that Councilman Carrigan and Mr. Vasquez had a commitment in a private capacity to the interests – or Councilman Carrigan had a commitment in a private capacity to the interests of Mr. Vasquez by nature of his relationship similar enough to a substantial and continuing business relationship that the independence of judgment of a reasonable person, in this case an elected official, in his situation would be materially affected, and as a result, I would think that he would have been required to abstain.

VICE CHAIRMAN HUTCHISON: Commissioner Hsu.

COMMISSIONER HSU: Thank you, Mr. Vice Chair. I guess I have been calling you Mr. Chair this whole hearing. You are the Chair of the meeting.

VICE CHAIRMAN HUTCHISON: Call me Your Majesty if you like.

COMMISSIONER HSU: Your Highness.

I have a different take on the issue of commitment in a private capacity to the interests of others, that language. I don't necessarily believe that there was a substantial and continuing business relationship, but I do believe that it was similar to [194] that of a person -- similar to a household or family member. I'm trying to find my statutes real quick.

What we heard today is you heard Carlos Vasquez and you heard Mr. Carrigan say that Carlos Vasquez only charged his costs, he didn't make any money in serving on three campaigns as the campaign manager for Mr. Carrigan, and Carlos Vasquez actually said it right out. He said in addition to him thinking he has one of the highest standards of just being a good person, he said he is a friend of mine. And the relationship really is one of a close friendship.

And Mr. Carrigan joked that -- well, Mr. Carrigan talked about having to abstain if it was his father but not necessarily his sister. But when pushed on it, I mean, he wouldn't consider Carlos like a brother, but in terms of what they do and the amount of interaction, they go to dinner, he confides in Carlos Vasquez, he is a confidante, that relationship between Mr. Carrigan and Carlos Vasquez appears to be a lot closer than that of between Mr. Carrigan and his sister.

And so I think that the commitment in a – I got to look at my statutes again -- I think that where the commitment in a private capacity exists is that it is substantially similar to a person who is related to Mr. Carrigan, not the continuing and business [195] relationship.

But that all being said, I think of my own experiences where I don't go to dinner with a lot of friends. I mean, there are different levels of friends. There are people you are acquaintance with, hence you call them your friends, and for politicians probably everybody is your friend to some degree who you have some kind of relationship with.

But I mean, this is a close relationship. It is substantial and continuing by Mr. Carrigan's own admission and Mr. Vasquez's own admission. Because of that close relationship, I think that's what would require an abstention.

What I'm struggling with is I think that he should have abstained on this, but what I'm struggling with is that he was reliant on counsel on this, and unfortunately, he got advice that was based on things that -- I mean, it didn't even mention the commitment in a private capacity, that statutory language, the subsection -- I keep missing it -- subsection (8)(e). And there is some history behind why subsection (e) came into play.

When I first started, there was a case that was going on, and I don't know the facts of it per se, I just heard of it, but in Las Vegas there was an Ethics [196] Commission hearing against Yvonne Atkinson-Gates, I believe is her name, and she was apparently doing -- awarding favors or something. There was contracts being awarded to her friends and maybe campaign people, cronies, whatever you want to call it, and that case, there was a finding of a violation against Miss Gates, but it was appealed, and on the judicial review the court said that the language was too vague because those people were not members of a household, they were friends, and there was some language in there that was vague. It just referred to any other person.

So this subsection (e) was specifically added in order to get rid of the unconstitutionality of the statutory language previously, and it was specifically

added to include the kinds of close friendships that would have applied in the Atkinson-Gates case.

So I think this is the first one in my seven and-a-half years doing this where we actually apply this language in subsection (e) of NRS 281.501 subsection (8), sub part (e). So I think it is the friendship that creates the commitment -- the very close friendship. Because not all friendships are going to do that, but it is the very close friendship that creates the commitment in a private capacity to someone else.

But again, I'm struggling with the fact that [197] he relied on his legal counsel and followed -- I mean, he basically said, Mr. Carrigan basically said that if he was told to abstain he would have.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Hsu.

Other Commissioners? Commissioner Cashman.

COMMISSIONER CASHMAN: I guess I'm going to take a little bit different slant at it, but I think the result is similar.

I personally believe that seven years of political advice and counsel and running campaigns makes it a continuing business relationship, whether there's money exchanged or not. Mr. Carrigan in his own words indicated that Mr. Vasquez was instrumental in getting him elected. That creates a significant bond. That creates in my mind a relationship that's greater than just a friend or is even greater than a business associate. It's a dependent relationship. It could potentially be a relationship that has a feeling

of debt or I'm here because this person got me elected and has kept me elected.

I think personally that it has done Commissioner -- Council Carrigan, he has been done a great disservice by even having to be here because I think having one's campaign manager and long-term [198] confidante on the other side of an issue puts him in a terrible position, one I think he should have abstained from, and for that reason I believe that a commitment in a private capacity in the interests of Mr. Vasquez does exist and would vote in the affirmative on a motion.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Cashman. Other Commissioners?

Let me tell you how I feel about this. I think that there is a commitment in a private capacity as well, and I'll tell you why. I reach it on a couple different levels.

One is that I think after my questioning it was clear to me that there was a substantial and continuing business relationship, as Commissioner Cashman has already disclosed, there was in fact the exchanging of business-type activities. There were even checks going back and forth. Whether or not somebody made a profit of it I don't think is the definition of business. I think there was even some testimony that to my mind business is when money exchanges hands. And in fact, money exchanged hands in this relationship.

Now, do I think it was a prime -- I mean, it was solely a business relationship? No. It was a very close friendship. It was also a very close relationship

with a campaign manager, the very person who got the [199] Councilman elected and helped him, was very instrumental in getting him elected. Mr. Vasquez was highly instrumental in that endeavor according to the testimony here.

Furthermore, Mr. Vasquez was also a political confidante and adviser, someone who you may think, hey, he helped get me into office, he can help keep me here if he keeps me on the straight and narrow and gives me continuing political advice.

I can't imagine a situation -- and I agree with Commissioner Cashman, that Councilman Carrigan was in a very tough position when Mr. Vasquez decided to get involved in the Lazy 8. Very, very difficult.

You got now appearing in front of you as a decisionmaker your very, very close friend, with whom you have had a close relationship for a very long time. You have got your campaign manager who got you into office to begin with. You got your political consultant and adviser and confidante with whom you on a regular basis consult in ongoing political matters.

Very, very difficult for me to then say, now, would a -- now when I say this, I want to say it with all due respect to the Councilman, because I believe he is not anything but an upright and honorable man.

But the test is -- and what he said here [200] today is absolutely true in terms of the effect that this situation had on him and his decision-making process and taking into account all of his political constituents's desires. But the test isn't whether or

not Mr. Carrigan was in fact influenced. The test is whether or not a reasonable person in his position would have been materially influenced. I'm paraphrasing the statute.

And I think that a reasonable person in that position would be materially influenced by his very close friend being in front of him, his campaign manager and his political confidante all wrapped into one person standing in front of me presenting something and presenting a position. I just think that's just for a reasonable person, very, very difficult to overcome and they would be materially affected.

So I think there is a commitment in a private capacity. I do think that it would have had a material effect on a reasonable person in Mr. Carrigan's situation.

I also think that it is instructive to look at what the Legislature intended when it included this statute in our reg -- in our laws here. Under Senate Bill 478 in 1999, which ultimately became NRS 281.501 subsection (8), or at least that bill included that, Mr. Scherer testified before the Government Affairs [201] Committee, and he said a couple things that I think are instructive in this matter. And in talking about the substantial and continuing relationship he says, quote:

> "So the relationship would have to be substantial and continuing. Now if this was one where the same person ran your campaign, time after time after time, and you had a substantial and

> continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person." Close quote.

He also went on to clarify that this section just doesn't talk about mere friendship. That is why I don't think mere friendship requires disclosure. It requires more than that, and we have that here. We have the close friendship and relationship of a campaign manager, of a political confidante and adviser as well.

The Government Affairs Committee legislative history also provides that Mr. Scherer stressed, quote:

> "We are trying to leave the Commission, this Commission, some discretion in the extreme cases when he did not fall into one of these special specific pigeon holes, but they could nevertheless find that there was a relationship that was just as close or [202] closer. We don't want to get two friends per se.
>
> "And I think the Commission, you know, there's been a lot of talk in the press about friendships, but I think if you read the Commission's decisions carefully, you will see they don't talk about just friendships. They talk about relationships that go beyond friendship."

So I think the legislative intent is clear in terms of relationships that move beyond friendship, relationships that include more than just friendship and those friendships, and to me, that's present here. It falls then within NRS 281.501(8) subsection (e), any other commitment or relationship that is substantially similar to a commitment or a relationship described in this section. And my analogy is I believe that there is a substantial and continuing business relationship, but even if there wasn't, there certainly is a substantial and continuing political relationship and/or professional relationship that has continued to exist between the Councilman and Mr. Vasquez.

So I believe then that under NRS 281.501(2), that there was a commitment in a private capacity and that a reasonable person would materially have been affected by that private interest.

[203] I want to stress again to the Councilman and on the record that I don't for a minute think that he is not being accurate in his assessment and his testimony today in terms of the effect it had on him personally directly. But again, as I said, that is not the test under the statute. And so that is the reason that I get there, but I want to make my reasoning clear in terms of how I feel about the Councilman's testimony here today. Thank you.

Are there other comments? Yes, Commissioner Jenkins, please.

COMMISSIONER JENKINS: Now that we have thoroughly vetted the issue of a commitment in a private capacity to the interests of others, I feel that

we need to use Mr. Thornley's demonstrative, the one on the left and read the material in the final paragraph on the top left. It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons is not greater than that accruing to any other member of the general business, profession, occupation or group.

And this is where we have got a Hobson's [204] choice or Councilman Carrigan had a Hobson's choice, and that is do I go ahead and vote because I am committed to my constituents, despite the fact that I have a commitment in a private capacity to the interests of others. And would Mr. Vasquez's affect, if you will, on my judgment, if I were to vote in favor of something that might benefit him, benefit him more than the benefit accruing to any other public relations guy.

I don't know how to really deal with this. But the fact is, there is an out to the abstention requirement, and I don't think that I have ever done the analysis of that paragraph in a Commission on Ethics hearing.

VICE CHAIRMAN HUTCHISON: Well, let's do it.

COMMISSIONER JENKINS: Go ahead.

VICE CHAIRMAN HUTCHISON: Commissioner Hsu, why don't you take us through the statute and give us your thoughts.

COMMISSIONER HSU: Thank you, Mr. Chairman, Your Highness. I think people put too much emphasis on this language when I see people argue it when the resulting benefit or detriment accruing to him would not be greater than any accruing to any other member in a general business. There is only one lobbyist hired by Harvey Whittemore's group to do this, at least in terms [205] of what I heard. It's not like the entire business profession of lobbyists are being affected uniformly. That's kind of what that language is there for.

So I just don't see how that applies. I mean, we have one person, Carlos Vasquez is who is the spokesman or paid consultant for the Lazy 8 people, and he certainly gets the professional benefit by having this approved, and of course, the vote was that it got denied, the vote, but I just don't see how that language applies because it is not a broad application.

Again, not every lobbyist -- well, maybe there is testimony that could be had about Harvey Whittemore hiring every lobbyist, but I just don't see how every -- how the entire group of lobbyists is being affected by the passage or failure of this vote. Thanks.

* * * *

[206] COMMISSIONER JENKINS: No. We might consider that Councilman Carrigan is a resident of his ward and the decision to participate in the vote and his bringing [207] the motion and voting for it would not bring him or the project -- well, him any greater benefit than any other resident of his ward.

But you know, Vasquez just really throws a wrench in the whole thing, doesn't he?

VICE CHAIRMAN HUTCHISON: If I can comment, Commissioner Jenkins. We're really talking about it must be -- we're really talking about the independence of judgment of a reasonable person would be materially affected by -- would not be materially affected by his, we're not talking about pecuniary interest, we're talking about his commitment in a private capacity to the interests of others. So we're not talking about his interest as a citizen, we're talking about the private capacity interest to Mr. Vasquez.

So I think that Commissioner Hsu's reasoning does, I think, apply, and that is if you could say, look, the benefit that accrued to Mr. Vasquez was not any different than what accrued to everybody else. Then I think that you are fine. But Mr. Vasquez was in a different position than the general business, profession, occupation or group in terms of the Lazy 8 and the passage of the matter that was before the Council on August 23rd.

So I do think that Commissioner Hsu's reasoning makes sense to me and that paragraph does not [208] necessarily save the day.

COMMISSIONER JENKINS: If I could just throw one more thing on the record, and that is my analysis -- thank you, Commissioner Hutchison -- this is off the subject, but his acceptance of a gift or loan I eliminated because Vasquez's gift of free services was disclosed on his disclosure form and therefore it wasn't a gift. Pecuniary interest wasn't --

didn't apply here. So the commitment in a private capacity is the only one that did for me.

And I can't find any support for -- though I would like to think about it just one more minute – but I can't find any support for that paragraph, you're right, about the benefit being more or less than anyone else in a group. Thank you for the time to think about it, though.

VICE CHAIRMAN HUTCHISON: Are you finished thinking?

COMMISSIONER JENKINS: Yes, thank you.

* * * *

[210] COMMISSIONER JENKINS: While it pains me greatly that we have made a finding of a violation, I sincerely believe that Councilman Carrigan had no intent or purpose to benefit anybody other than his constituents, that he did not attempt in any way to disobey or disregard Chapter 281 of NRS. He relied on the advice of counsel. He sought counsel's advice when he had a question, and he followed counsel's advice, regardless of other opportunities he may have had to seek an advisory opinion or ask for a second opinion or say, are you sure. He did what he thought, and what I [211] thought, think, shows a clear intent to do what he believed was within the statute, and as a result, I don't think he willfully violated it in any way.

I also don't believe that he fits the safe harbor provisions that are in the statute that was adopted, the three things that all have to be present in order to be, per se, not a willful violation. Because he

didn't seek an advisory opinion from the Commission, and the action that he took probably was contrary to a prior published opinion of this Commission. However, we have received evidence that his counsel didn't even consider those.

But regardless, so I don't think that it is an automatic not willful, but I don't see any evidence that he knew or should have known that his conduct was going to violate the statute. Of course, we all should have known because we can read the statutes and apply them to ourselves. But I think this is a particularly difficult one, and I don't think the man acted with any intent or purpose to disregard the Ethics in Government Law.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Jenkins. Other comments or discussion about the willful violation aspect of NRS 281.501(2)? Commissioner Hsu.

[212] COMMISSIONER HSU: Thank you, Mr. Vice Chair. Really what happened as I see it is that, unfortunately, Councilman Carrigan got incomplete advice. I don't want to say bad advice but incomplete advice.

When I look at the opinion letter from the City Attorney's office and the conclusion, it states, "The only type of bias which may lead to disqualification of a public official must be grounded in fact demonstrating that the public stands to reap either financial or personal gain or loss as a result of the official action." And Councilman Carrigan is pretty clear he didn't stand to reap any financial or personal gain on that.

But that is not necessarily what the statute -- that is not the only situation which requires an abstention, unfortunately. And Councilman Carrigan said if he would have been told to abstain he would have. And we have gone through the statutes, and there are other types of situations in which you should abstain. And actually Councilman Carrigan pointed it out, if it was his father he had said he would have abstained. If his father was there, that doesn't mean there is any financial or personal gain or loss to him.

So it's unfortunate that there is this opinion that he sought and it just didn't quite go far [213] enough, because I think that the facts have really been fleshed out that this is a pretty close relationship that would require an abstention, but would have followed what his lawyer would have told him. So I just can't find him being willful under the circumstances.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Hsu.

Other comments by Commissioners? Commissioner Cashman.

COMMISSIONER CASHMAN: I, too, don't believe that Councilman Carrigan did anything willful in this case. Although I am bothered by -- the reason I say that is because he did follow the advice of counsel, albeit incomplete.

I am concerned, though, that sort of the smell test, the reasonable person statute where somebody looks at it from an arm's length, and it is very difficult to do when you are dealing with personal

relationships, and I think that is where the rub comes in. The smell test just should have said, you know, I don't know that I can vote on this if my good friend is representing the other person on the other side. I think I got to abstain.

I mean, as difficult as it is and as much as you want to do what you think is right for your [214] community, I think that -- in my mind it is not willful but there is a smell test issue here that Mr. Carrigan certainly should have picked up on or should have known, and I just think that the analysis of these personal relationships like this are very difficult for individuals and create difficult situations and difficult choices.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Cashman. Commissioner Cashman, just for clarification, in addition to the good friend, of course, he was the campaign manager and the political confidante and all the comments you made previously as well. Is that also part of the concern expressed as well?

COMMISSIONER CASHMAN: It is the sum total of the relationship.

VICE CHAIRMAN HUTCHISON: Right, right.

COMMISSIONER CASHMAN: To me, it transcends just a business relationship and becomes more. But it is the sum total of the relationship as the consultant, as a friend, as a political confidante, and as somebody that he's relied on to put him in the position that he's in.

VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Cashman.

Commissioner Jenkins, please.

COMMISSIONER JENKINS: Here I go again. I [215] fear that if relying on so-called incomplete legal advice is the reasoning for the finding of no willfulness, that every elected official is going to go out and get a first year lawyer and get advice, and that lawyer will intentionally fail to review the Ethics Commission's written opinions and tell their clients go for it or don't, whatever you want to do, you can rely on my opinion. And I certainly, certainly don't want that to happen.

So when this opinion is drafted, I think it's going to be important that we say something about the Sparks City Attorney's office being on notice of the evaluation of the statutes with regard to abstention and disclosure, and place that squarely in the opinion if we find that there is no willfulness, that relying on counsel's recommendations in and of itself is not adequate for a finding of not willfulness.

I think that Councilman Carrigan's intentions were made clear through a myriad of evidence presented and not just his reliance on the advice of counsel, on his record, on his presentation, the presentation by the other witness, Mr. Vasquez, and the materials in our evidence books. So please, let's put the slippery slope argument out there because that certainly isn't going to fly more than once or so.

[216] VICE CHAIRMAN HUTCHISON: Thank you, Commissioner Jenkins.

For me, let me just begin where Commissioner Jenkins left off, and that is, to me, the reliance on counsel is just one of the facts that we look at. If you really want to evaluate willfulness, there are opinions on this, the McDonald opinion is a good one, and others, and I believe Commissioner Jenkins has already gone through the analysis.

Our opinion in McDonald says specifically it is on a case-by-case basis and that you want to take a look at the public official's activities and determine whether they acted voluntarily and with a specific intent and purpose either to disobey or disregard the NRS Chapter 281, what that requires, or do something which NRS 281 forbids.

I didn't find any evidence of that in this hearing. And I do think it is unfortunate, I think we're all saying it is unfortunate that you are here because you did go out and seek the advice of counsel. I think at least I found your testimony, Councilman, to be credible, that you relied upon that opinion, that you would have followed whatever your counsel told you to do.

COMMISSIONER JENKINS: We're not talking to him, we're deliberating.

[217] VICE CHAIRMAN HUTCHISON: But I'm just looking at him. I just found that that testimony was credible. I found that he would have followed the advice of his lawyer. Had he done so, and had been more completely informed, I'm confident that he would have done what they told him to do.

So I echo the sentiments of Commissioner Jenkins as well that we're not simply saying go out

and get a lawyer who may or may not do a good job. We're saying follow the opinions and the statutes that are already published and provided.

So I likewise do not find in the testimony a basis for willfulness or for intentional conduct, and therefore, I would not be able to support such a finding.

* * * *

[218] VICE CHAIRMAN HUTCHISON: So with those deliberations, Councilman, I can now turn my attention to you. Unless there is any other comments before we do so or other matters that need to be discussed, I believe we can close our deliberations and we will do so.

Councilman Carrigan, I'll just repeat what the Commission has decided. On the charge concerning your violation of NRS 281.481 subsection (2), regarding your use of an official position to secure or grant unwarranted privileges, preferences or advantage for yourself or person to whom you have a commitment in a private capacity, when you voted on Lazy 8 matter, the [219] Commission found that you did not violate that statute on a five-to-one basis.

Under the charge that you had violated NRS 281.501 subsection (4), regarding whether your relationship with Mr. Vasquez was a relationship under NRS 281.501 subsection (8) that needed to be disclosed and whether you sufficiently disclosed that relationship, the Commission found that you did not violate NRS 281.501 subsection (4) by a vote of four to two.

And finally with regards to NRS 281.501 1subsection (2), the Commission found that you should have abstained from acting on the Lazy 8 matter and therefore violated NRS 281.501 subsection (2). However, on a vote of five to one, the Commission has found that you did not do so willfully.

That concludes our decisions and our deliberations. My question for you, Councilman, is do you have any questions or would you like to make any final comments.

MR. CARRIGAN: No, sir. I just thank you for your time.

VICE CHAIRMAN HUTCHISON: Thank you so much.

MR. CARRIGAN: I just want to say this was a great education here, and I just hope that other elected officials will take a look at this, because I'm not an [220] attorney, I relied on an attorney's opinion, and it bit me in the butt. And I just hope, you are talking about the slippery slope, I hope that even if you go out and find an attorney that's been around for 20 years, that if you are going to rely on their opinion, you have to take a look at the elected official.

You can read NRS all you want, but there is a lot of convoluted statements in there. So I would request that if you expect me as an elected official to take look at that, let's make it pretty easy for me to read.

Because you asked me, hey, I relied on my attorney. That is what the City of Sparks pays him for. And like I said, if he would have said, you know, you should abstain from this, I probably -- well, I already said I would have abstained.

But anyway, I thank you, Your Honor, for your time.

VICE CHAIRMAN HUTCHISON: Thank you, Councilman. Just final comment. You may want to take a look at NRS 281.551 subsection (5), and that does provide the safe harbor provisions where for sure if there is any questions in the future, you have a way of and a process to address that, and I do just want to reiterate, though, I think you heard the comments of the Commission in terms [221] of how we viewed you and your veracity and your honorableness, and your honor, and that was I don't think in any way degraded here or questioned here. So we thank you for your time and appreciate you going through a difficult process. Thank you.

MR. CARRIGAN: Thank you.

VICE CHAIRMAN HUTCHISON: You bet. And with that we will close Agenda Item No. 2. And we will give everyone a chance to get out of the room, and then we will take up Agenda Item No. 3.

(Matter concluded at 3:15 p.m.)

DRAFT

BEFORE THE
NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING THE CONDUCT OF MICHAEL CARRIGAN City Councilman, City of Sparks	Requests for Opinion No. 06-61, 06-62, 06-66 & 06-68

STIPULATED FACTS

COMES NOW, Michael Carrigan, by and through the undersigned counsel, and asks that the following facts be stipulated to by the Nevada Commission on Ethics, and entered into the record of the above referenced matter.

FACTS

1. Sparks Councilman Michael Carrigan is a public officer as defined in NRS 281.4365(1).

2. The Nevada Commission on Ethics has jurisdiction over this matter pursuant to NRS 281.511(2).

3. Councilman Carrigan and Carlos Vasquez have been friends since 1991.

4. Carlos Vasquez acted as Councilman Carrigan's campaign manager in 1999.

5. Councilman Carrigan was elected to the Sparks City Council in 1999.

6. Carlos Vasquez acted as Councilman Carrigan's campaign manager in 2003.

7. Councilman Carrigan was re-elected to the Sparks City Council in 2003.

8. Carlos Vasquez acted as Councilman Carrigan's campaign manager in 2006.

9. Councilman Carrigan was re-elected to the Sparks City Council in 2006.

10. The above listed professional relationships do not continue outside of each individual election, and therefore constitute three separate undertakings, not a single continuous business relationship.

11. Councilman Carrigan has properly reported all campaign contributions as regulated by NRS Chapter [2] 294A.

12. In anticipation of the August 23, 2006 meeting fo the Sparks City Council, Councilman Carrigan asked Senior Assistant City Attorney David Creekman to provide a legal opinion regarding disclosure parameters and the applicable law on abstention from voting.

13. Pursuant to Councilman Carrigan's request, Mr. Creekman prepared a legal opinion entitled "Bias or Predisposition as Grounds for Disqualification of an Elected Official." Mr. Creekman's opinion is included at page 000038 of the NCOE's Exhibit List.

14. David Creekman summarized and reminded the entire City Council of the August 17, 2006 opinion via email approximately one hour before the August 23, 2006 meeting of the Sparks City Council.

15. Councilman Carrigan relied on David Creekman's advice when he fully disclosed his relationships with Carlos Vasquez. Further, Councilman Carrigan explained why his judgment would be unaffected by said relationships at the August 23, 2006 meeting. Councilman Carrigan's disclosures are included on page 000102 of the NCOE's Exhibit List.

16. Councilman Carrigan voted "yes" on the Lazy 8 agenda item at the August 23, 2006 City Council meeting.

17. The Lazy 8 agenda item failed at the August 23, 2006 City Council meeting.

Respectfully submitted this ___ day of July, 2007.

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL A. CARRIGAN, Fourth Ward City Council Member, of the City of Sparks, Appellant,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, Respondent

Docket No. 51920
District Court No. 07-OC-012451B

FILED

JUL 24 2008

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APPELLANT'S OPENING BRIEF

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RECEIVED
JUL 24 2008

* * * *

State statutes that burden political speech, such as NRS 281A.420(8) and NRS 281A.420(2), are subject to strict scrutiny, and the statutory restriction of speech is upheld only if it is narrowly tailored to serve a compelling state interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421 (1978). The broad purview of NRS 281A.420(8) includes any actual or implied relationship that the Commission on Ethics arbitrarily determines to be "substantially similar" to any of the other relationships specifically enumerated in the subsection. Because of the uncertainty that accompanies these unconstitutionally vague standards, relationships that do not amount to a "commitment in a private capacity to the interests of others" but for the unfettered discretion and personal predilections of the Commission on Ethics, are necessarily encumbered, and the reach of NRS 281A.420(2), through its reliance on NRS 281A.420(8), is not restricted to a narrow category of unprotected speech. Accordingly, NRS 281A.420(8) and NRS 281A.420(2) are not narrowly tailored, and the statutes do not employ the least restrictive means available to regulate conflicts of interest. Therefore, NRS 281A.420(8) and NRS 281A.420(2) do not survive strict scrutiny and violate the First Amendment.[4]

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[4] The First Judicial District Court incorrectly applied the balancing test established in *Pickering v. Board of Education*,

391 U.S. 563 (1968), to the situation in this case. JA 0391, lns. 14-17. When a court applies the *Pickering* balancing test, it must arrive at a balance between the interests of the employee, *as a citizen*, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-1735 (1968) (emphasis added). Here, Councilman Carrigan is speaking as an elected representative of the citizens of Sparks, not as a private citizen.

To the extent this Court is inclined to consider the *Pickering* balancing test, the scales of justice still tip decisively in favor of Councilman Carrigan. Public officers in Nevada have a strong interest in voting their conscience on important issues without having to suffer retaliatory recriminations from the Nevada Commission on Ethics. *See, e.g., Connick v. Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("It is essential that public employees be able to speak freely without fear of retaliatory dismissal."). The public also has a substantial interest in members of public authorities being able to freely cast their votes in accordance with their best judgment, without fear of political interference and intimidation. *See Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (noting "public interest in encouraging the vigorous exercise of official authority"). Together, Carrigan's interest and the public's interests weigh heavily on Carrigan's side of the *Pickering* balance. Although the State has an interest in securing the ethical performance of governmental functions, that alone is not strong enough to overcome the interest of the citizenry of Sparks in representative government. NRS 294A.100 limits the amount of money, or value of services, any person can contribute to a campaign for public office in Nevada.

Moreover, NRS 294A.100 controls the timeframe in which political donations can be made. Failure to comply with the provisions of NRS 294A.100 is a category E felony. Any concerns that the state may have regarding the campaign contributions made by Mr. Vasquez to Councilman Carrigan's campaigns are mitigated by the limitations placed on campaign contributions by state law. By finding that Councilman

* * * *

Carrigan's vote on the Lazy 8 project accurately reflected the will of his constituents and that Carrigan sufficiently disclosed his relationship with Mr. Vasquez, the Commission on Ethics essentially found that no actual impropriety existed in this case. JA 0281, #15; JA 0289. Therefore, the notion that Councilman Carrigan should have abstained from voting on the Lazy 8 matter because of the political contributions from Mr. Vasquez - the government's interest in this case for purposes of *Pickering* balancing - is based entirely on a supposed appearance of impropriety. The contributions in this case did not violate NRS 294A.100, and were properly reported under NRS 294A.120. Accordingly, any concern that the government may have regarding the ethical performance of governmental functions is alleviated by the limitations imposed on campaign contributions by NRS Chapter 294A. If properly received and reported campaign contributions amount to a disqualifying conflict of interest under NRS Chapter 281, the Ethics in Government Law will serve as the de facto limitation on campaign contributions without specifically enumerating the point at which a contribution becomes a disqualifying conflict of interest. Therefore, if a *Pickering* balancing test is applied to this situation, the interests of Councilman Carrigan, Nevada's public officers, and the public at large overwhelmingly militate in favor of Councilman Carrigan's First Amendment right to vote on projects before the Sparks City Council.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

No. 10-568

In the Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the State's Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a provision of the recusal statute was overbroad and facially unconstitutional. The question presented is:

Whether the Nevada Supreme Court erred by applying strict scrutiny to the State's content- and viewpoint-neutral recusal rule.

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Burdick v. *Takushi*, 504 U.S. 428 (1992) ..... *passim*

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Eller Media Co. v. *City of Reno*, 59 P.3d 437 (Nev. 2002) (per curiam) 34

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Cases—Continued: **Page(s)**

Presley v. *Etowah Cnty. Comm'n*, 502 U.S. 491 (1992) 26

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Miscellaneous:

1 Annals of Cong. (1789) 20

Clark, Aaron, *Manual, Compiled & Prepared for the Use of the Assembly* (1816) 21

Cooper, Sarah, *Both Carrigan and Salerno asked to abstain from Lazy 8 vote by state commission*, Sparks Trib., May 8, 2009 10

Crocker, George G., *Principles of Procedure in Deliberative Bodies* (1889) 21-22

Currie, David, *The Constitution In Congress: The Federalist Period 1789-1801* (1997) 19, 20, 28, 30

Cushing, Luther S., *Rules of Proceeding & Debate in Deliberative Assemblies* (1848) 21

Davis, Kenneth C., *Administrative Law Text* (1972) 34

Fish, George T., *American Manual of Parliamentary Law* (1880) 21

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg. (Nev. Mar. 30, 1999) 55

Jefferson, Thomas, *Manual of Parliamentary Practice* (New York, Clark & Maynard 1868) (1801) ..... *passim*

Miscellaneous—Continued: **Page(s)**

Kagan, Elena, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996) 48

National Conference of State Legislatures, *Voting Recusal Provisions* (last updated Oct. 2009) 22

Office of Legislative Research, Conn. Gen. Assembly, 2000-R-0155, *Voting Restrictions in State Ethics Codes* (Feb. 2000) 22

Oretlicher, David, *Conflicts of Interest and the Constitution*, 59 Wash. & Lee L. Rev. 713 (2002) 33

Pildes, Richard H., *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29 (2004) 26

Randazzo, Ryan, *Lazy 8 Casino Settlement Approved,* Reno Gazette-J., Sept. 21, 2006 8

Rules of the House of Representatives, 112th Cong. (2011) 28

Smull, John A., *Smull's Legislative Hand Book* (1875) 21

Teachout, Zephyr, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009) 21

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OPINIONS BELOW

The en banc opinion of the Nevada Supreme Court (Pet. App. 1a-39a) is reported at 236 P.3d 616. The opinion of the First Judicial District Court of Nevada (*id.* at 40a-95a), and the opinion of the Nevada Commission on Ethics (*id.* at 96a-112a) are unreported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on July 29, 2010. The petition for a writ of certiorari was filed on October 27, 2010 and was granted on January 7, 2011. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech."

Section 281A.420 of the 2007 Nevada Revised Statutes ("Nev. Rev. Stat.") provides, in pertinent part, that:

> 2. * * * [A] public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
>
> (a) His acceptance of a gift or loan;
> (b) His pecuniary interest; or
> (c) His commitment in a private capacity to the interests of others.

* * * * *

8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:

(a) Who is a member of [the public officer's] household;

(b) Who is related to [the public officer] by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs [the public officer] or a member of his household;

(d) With whom [the public officer] has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

Nev. Rev. Stat. § 281A.420 (2007).

STATEMENT

The Nevada Supreme Court applied strict scrutiny to invalidate a provision of the State's Ethics in Government Law that requires public officials to refrain from casting votes on matters on which they have a conflict of interest, on the ground that it was a facially overbroad abridgement of legislators' free speech rights. That decision has no support in this Court's precedents, which stand against the claimed First Amendment right to cast a legislative vote, let alone to do so on matters where the official has a disqualifying conflict of interest. And this Court has consistently upheld reasonable, content-neutral,

nondiscriminatory laws that do not target expression, without resorting to strict or heightened scrutiny. The reasons against constitutionalizing the processes of state and local self-government apply with special force here, because recusal rules have been widely used since the earliest days of the Republic, and have long been understood to embody fundamental principles of governance wholly unrelated to the suppression of ideas or expression. Indeed, the decision below appears to be literally unprecedented: we are aware of no prior decision of any court holding that a generally applicable recusal provision is constitutionally invalid. Subjecting such basic, neutral rules to heightened scrutiny is not only contrary to centuries of practice; it would be calamitous as a practical matter, needlessly subjecting state governments to intrusive and burdensome federal litigation serving no First Amendment purpose. Reversal is warranted.

1. The Nevada Legislature enacted the Ethics in Government Law (the "Law") to ensure that the State's public offices are "held for the sole benefit of the people" and "[t]o enhance the people's faith in the integrity and impartiality of public officers and employees." Nev. Rev. Stat. § 281A.020(1)(a), (2)(b) (2009). The Law provides that a "public officer" (including local legislators[1]) "must commit himself or herself to avoid conflicts between the private interests of the public officer * * * and those of the

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[1] See Nev. Rev. Stat. § 281A.160 (2009). The Law provides that the disclosure and recusal obligations of state legislators are addressed by the Standing Rules of the Legislative Department. *Id.* § 281A.420(7) (2009).

general public whom the public officer * * * serves." *Id.* § 281A.020(1)(b) (2009). To ensure that officials are aware of its requirements, the Law requires every public officer to file with the State's Commission on Ethics (the "Commission"), at the beginning of each new term of office, a form acknowledging that the officer has received a copy of the Law and has "read and understands the statutory ethical standards." *Id.* § 281A.500(1)(a), (2)-(3) (2009).

The Law creates requirements applicable to any public officer who has a private interest in a matter stemming from the officer's "acceptance of a gift or loan," "[h]is pecuniary interest," or "[h]is commitment in a private capacity to the interests of others." Nev. Rev. Stat. § 281A.420(2), (4) (2007). In many instances, the officer may take action after "disclosing sufficient information * * * to inform the public" of the circumstances. *Id.* § 281A.420(4) (2007).[2] In cases where "the independence of judgment of a reasonable person in [the officer's] situation would be *materially* affected by" his acceptance of a gift or loan, pecuniary interest, or "commitment in a private

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[2] At the time of relevant events, the disclosure and recusal provisions of the Ethics in Government Law were codified at Nev. Rev. Stat. § 281.501 (2003). The provisions were recodified without relevant change at Nev. Rev. Stat. § 281A.420 (2007). See Pet. App. 41a n.1. This brief cites the 2007 codification because that is the edition referenced by the court below. *Id.* at 2a n.2. In 2009, the provision was amended to require recusal only in "clear cases," but the Nevada Supreme Court concluded that change neither cured the perceived overbreadth of the recusal statute nor affected the applicable standard of review. See *ibid.* Both the 2007 and 2009 versions of Section 281A.420 are included in an appendix to this brief.

capacity to the interest of others," the Law provides that the officer "shall not vote upon or advocate the passage or failure of [the matter]." *Id.* § 281A.420(2) (2007) (emphasis added).

The Law defines the disqualifying "commitment[s]" as those involving: (a) "member[s] of [the public officer's] household"; (b) relatives of the officer by "blood, adoption or marriage"; (c) the employer of the officer or a member of the officer's household; (d) persons with whom the public officer "has a substantial and continuing business relationship"; or (e) "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." *Id.* § 281A.420(8)(a)-(e) (2007). The Law distinguishes between widely shared interests that the official shares with "any other member of the general business, profession, occupation or group" to which the official belongs, and specific personal interests. The former are "presumed" not to materially affect the officer's "independence of judgment." *Id.* § 281A.420(2) (2007).

The Commission administers and enforces the Ethics in Government Law. See generally *id.* § 281A.200 (2009). The Legislature structured the eight-member Commission to provide non-partisan, expert enforcement. See, *e.g.*, *id.* § 281A.200(2)-(4) (2009). The Law grants the Commission authority to "investigate and take appropriate action regarding an alleged violation" of the Ethics in Government Law, *id.* § 281A.280(1) (2009), including the imposition of civil penalties for willful violations, *id.* § 281A.480(1)-(3) (2009). The Commission is empowered to render, upon request, binding advisory opinions that

"interpret[] the statutory ethical standards and apply the standards to a given set of facts and circumstances." *Id.* § 281A.440(1)-(2) (2009).

2. Respondent Michael A. Carrigan is an elected member of the City Council of Sparks, Nevada, an incorporated subdivision of the State. See generally Nev. Const. art. 8, § 8. In early 2005, a developer submitted an application for a hotel-casino project known as the "Lazy 8" to the Sparks City Council for required master plan and zoning changes. Pet. App. 3a. Because the Lazy 8 project was controversial citywide and was to be built in the ward Carrigan represented, it was a frequent subject of his conversations with constituents and his 2006 campaign to be reelected for a third term. J.A. 173-174.

The developer retained as a consultant Carlos Vasquez, a "longtime professional and personal friend" of Carrigan's who had served as Carrigan's campaign manager "[d]uring each of his election campaigns," including his then-current one. Pet. App. 3a. Vasquez had been Carrigan's "close personal friend[]" for years; the two "routinely discuss[ed] political matters * * * throughout [Carrigan's] terms in office, not just during political campaigns, and [Carrigan] considered Vasquez to be a trusted political advisor and confidant." *Id.* at 44a. During each of the campaigns, Vasquez and companies he owned provided services to Carrigan's campaign at cost. *Id.* at 44a, 88a, 105a. During the 2006 election, approximately 89 percent of Carrigan's campaign expenditures were made through Vasquez's advertising firm. See J.A. 120, 131, 141.

The Lazy 8 project came before the Sparks City Council for tentative approval on August 23, 2006—approximately six months after Vasquez was first engaged, Pet. App. 37a n.7, 65a, one week after Vasquez had helped Carrigan win his primary election, and eleven weeks before Carrigan's victory in the general election. *Id.* at 33a n.6. Carrigan was aware that his relationship with Vasquez was potentially disqualifying under the Ethics in Government Law. He was also aware that he could have obtained an advisory opinion from the Commission on whether abstention was required. J.A. 222-223. Carrigan instead sought the advice of the Sparks City Attorney, who told him that his obligations under the Law could be discharged by publicly disclosing the relationship before voting on the Lazy 8 matter. Pet. App. 4a.

When the Lazy 8 agenda item was called, Carrigan disclosed that Vasquez was his personal friend and campaign manager, but stated that he planned to vote because he had no personal financial interest in the matter. J.A. 20, 82. (Mayor Geno Martini, who did not have a vote on the Council, disclosed that Vasquez was also his friend and campaign manager. J.A. 20, 82.) City of Sparks Senior Planner Tim Thompson then spoke, recommending, on behalf of the City's Planning Commission, rejection of the Lazy 8 proposal. J.A. 20. Vasquez and other representatives of the developer then made a presentation advocating approval. J.A. 41-48. During the public comment period, the speakers in opposition included representatives of the Nugget hotel and casino, which would be a competitor of the proposed development. The Council asked questions throughout and debated

the measure after the close of comments. J.A. 37-78. Carrigan then moved for a vote and cast his vote to approve the Lazy 8 project. The measure failed by a single vote. J.A. 80.

3. The Commission received several complaints that Carrigan had violated the Ethics in Government Law by casting a vote on the Lazy 8 matter.[3] A panel of the Commission conducted a preliminary inquiry that found sufficient cause to inquire further. Pet. App. 4a, 96a.

In October 2007, after a hearing at which both Carrigan and Vasquez testified, *id.* at 97a, the Commission concluded that Carrigan had violated Nev. Rev. Stat. § 281A.420(2)(c) "by not abstaining from voting on the Lazy 8 matter." Pet. App. 112a. The Commission noted that: Vasquez was Carrigan's campaign manager at the time of the Lazy 8 vote; Vasquez and his companies had provided services to Carrigan's three campaigns at cost; Carrigan had testified that Vasquez's assistance was

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[3] The complaints and the proceedings below solely addressed the August 23 City Council vote. The setback for the Lazy 8 project proved temporary. Within days, the developer of the Lazy 8 filed suit against the City, claiming it was entitled to proceed under a 1994 agreement with the City allowing construction of a hotel and casino in another section of Sparks. On September 1, 2006, the City Council voted 3-2 in a private meeting to settle the lawsuit by allowing the development to proceed. After the State Attorney General stated that the meeting violated the State's open meeting law, on September 20, the Council voted publicly to approve the settlement. Both times, Carrigan voted to approve the settlement. See Appellant's Nev. S. Ct. Br. 3-4; Ryan Randazzo, *Lazy 8 Casino Settlement Approved*, Reno Gazette-J., Sept. 21, 2006, at A1.

"instrumental" to his three successful campaigns; and they had a "close personal" relationship. *Id.* at 104a-105a. The Commission unanimously concluded that a reasonable official in Carrigan's situation "would undoubtedly have such strong loyalties to [his] close friend, confidant and campaign manager as to materially affect [that] person's independence of judgment." *Id.* at 112a. The Commission specifically concluded that the "sum total of [Carrigan and Vasquez's] commitment and relationship equates to a 'substantially similar' relationship to those enumerated under [Nev. Rev. Stat. § 281A.420](8)(a)-(d), including a close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" *Id.* at 105a-106a.

Because Carrigan had relied on the advice of counsel, the Commission determined that his "violation was not willful" and imposed no fine. *Id.* at 112a. The Commission concluded that inquiries under two other ethics provisions, involving whether Carrigan had "secure[d] or grante[d] unwarranted privileges" or had voted on a matter in which he had an undisclosed pecuniary interest, were not well founded. *Id.* at 106a-109a.[4]

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[4] This was not the last ethics issue arising from the Lazy 8 development. After the developer of the Lazy 8 filed a complaint against Sparks Councilman Phillip Salerno, Salerno entered into a stipulation with the Commission in October 2008 admitting he had willfully violated the Ethics in Government Law by failing to disclose at the August 23, 2006 City Council meeting that his business forms company had an ongoing relationship with the Nugget hotel and casino, an opponent of the Lazy 8, and for then failing to abstain from voting. *In re*

4. The First Judicial District Court affirmed the Commission's decision. Pet. App. 40a-95a. The court held, in relevant part, that subsections (2)(c) and (8)(e) "are facially constitutional under the *Pickering* [v. *Board of Education*, 391 U.S. 563 (1968)] balancing test" and constitutional as applied to Carrigan. *Id.* at 62a-63a. The court reasoned that "the free speech and associational rights of public officers * * * are not absolute," *id.* at 58a, and that "states may enact reasonable regulations" limiting the activities of public officials without violating the First Amendment. *Id.* at 59a. The "vital state interest in securing the efficient, effective and ethical performance of governmental functions," the court

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Salerno, No. 08-05C (Nev. Comm'n Ethics Dec. 2, 2008), Exh. A; see also Sarah Cooper, *Both Carrigan and Salerno asked to abstain from Lazy 8 vote by state commission*, Sparks Trib., May 8, 2009.

After it became clear in April 2009 that the Council would have to act on a proposed city master plan amendment for the Lazy 8 to proceed, both Salerno and Carrigan sought advisory opinions from the Commission, which advised both to abstain based on their relationships with the Nugget and Vasquez, respectively. See *In re Carrigan*, No. 09-28A (Nev. Comm'n Ethics July 15, 2009); *In re Salerno*, No. 09-21A (Nev. Comm'n Ethics May 22, 2009). On July 27, 2009, by a 2-1 vote (with both Carrigan and Salerno abstaining), the Council approved the amendment, permitting the Lazy 8 to go forward. Carrigan sought review of the Commission's advisory opinion, and in July 2010, a district court held Nev. Rev. Stat. § 291A.420(8)(e) and (d) invalid on First Amendment grounds. See *Carrigan* v. *Nevada Comm'n on Ethics*, No. CV09-02453 (Nev. D. Ct. July 2, 2010). The Commission appealed, but the Nevada Supreme Court dismissed the appeal on mootness grounds without reaching the merits. *Nevada Comm'n on Ethics* v. *Carrigan*, No. 56462 (Nev. Dec. 9, 2010); see also Resp. Supp. Br. 1-2 (filed Dec. 10, 2010).

concluded, outweighs any interest that a public officer may have "in voting upon a matter in which he has a disqualifying conflict of interest," *id.* at 61a-62a.

The court rejected Carrigan's argument that the Ethics in Government Law was unconstitutionally overbroad. It concluded the recusal provision was subject to less exacting scrutiny because it "regulate[d] in an even-handed and neutral manner" and did not suppress any particular viewpoint, and because the First Amendment interests of public officials were slight in view of the "universal and long-established rule under the common law that members of public bodies are prohibited from voting upon matters in which they have disqualifying conflicts of interest." *Id.* at 67a. The court concluded that the "substantially similar" language of Section 281A.420(8)(e) was not impermissibly vague, reasoning that because it was "expressly tied to the four types of private commitments and relationships already enumerated in the statute," it provided "four very specific and concrete examples to guide and properly channel interpretation of the statute." *Id.* at 77a.

5. A divided Nevada Supreme Court reversed, holding Nev. Rev. Stat. § 281A.420(8)(e) (2007) facially unconstitutional. Pet. App. 1a-17a. The majority reasoned that "[b]ecause voting is a core legislative function, it follows that voting serves an important role in political speech." *Id.* at 11a. The majority thus concluded that "voting by an elected public officer on public issues is protected speech under the First Amendment." *Ibid.* The majority then held that balancing of the sort employed for

employee speech under *Pickering* was inappropriate because an elected public officer's "relationship with the state differs from that of most public employees," because the officer's "'employer' is the public itself, * * * with the power to hire and fire." *Id.* at 12a (quoting *Jenevein* v. *Willing*, 493 F.3d 551, 557 (5th Cir. 2007)) (internal quotation marks omitted). Having rejected a balancing framework, the majority concluded that "[a] strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues." *Id.* at 11a (emphasis deleted).

The majority acknowledged the importance of "promoting the integrity and impartiality of public officers." Pet. App. 16a. Nonetheless, it determined that subsection 8(e), which requires recusal when a person has a "commitment or relationship that is substantially similar" to one of the four relationships enumerated in Nev. Rev. Stat. § 281A.420(8)(a)-(d), "[wa]s not narrowly tailored" (*id.* at 15a) because it lacked the "high level of clarity" (*id.* at 14a) to "sufficiently describe what relationships are included" and thus "fail[ed] to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal." *Id.* at 16a-17a. Because the majority concluded that the recusal requirement "sweeps within its control a vast amount of protected speech" and thereby has a "chilling effect on the exercise of protected speech," *id.* at 17a, it held that the "strong medicine" of overbreadth analysis was warranted (*id.* at 14a), and invalidated § 281A.420(8)(e) as "facially overbroad." *Id.* at 13a (emphasis deleted). In light of this disposition, it did "not address Carrigan's

vagueness * * * argument[]" based on the "substantially similar" language. *Id.* at 6a n.4.

6. Justice Pickering dissented. She acknowledged that "a public official's vote * * * 'arguably contains a communicative element.'" Pet. App. 22a (quoting *Spallone* v. *United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting)). She observed, however, that the recusal requirement's "target is conduct—acts of governance—not personal, expressive speech." *Ibid.* Where, as here, "the purpose [of the law] is prophylactic—to avoid conflicts of interest—not retaliatory," it was appropriate to apply rational-basis review, or "at most" intermediate scrutiny. *Id.* at 26a. Justice Pickering noted that in cases arising in the election setting, the level of scrutiny "'depends upon the extent to which a challenged [action] burdens First and Fourteenth Amendment rights,'" so that strict scrutiny is appropriate only when "'such rights are subjected to severe restrictions,'" but "'if the burden imposed is less than severe and reasonably related to [an] important state interest, the Constitution is satisfied.'" *Id.* at 28a (quoting *Monserrate* v. *N.Y. State Senate*, 599 F.3d 148, 154-155 (2d Cir. 2010)). She observed that "[t]he justification for requiring recusal in matters involving conflicts of interest * * * is strong," and the recusal provision "d[id] not severely or discriminatorily burden the official or his constituents." Pet. App. 31a, 30a. In light of the "'universal and long-established tradition'" requiring legislators to recuse themselves from matters implicating private interests, *id.* at 33a (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 785 (2002)), she concluded that the Law is valid.

Justice Pickering also concluded that the "substantially similar" language of the recusal statute was not overbroad. Pet. App. 33a-39a. She emphasized that the words of the provision are "not free-standing," but are to be read in light of the statute's four enumerated covered relationships, thus inherently limiting the statute's reach. *Id.* at 37a. Finally, Justice Pickering warned that "applying First Amendment strict scrutiny * * * to invalidate state conflicts-of-interest laws that govern local governmental officials who vote * * * opens the door to much litigation and little good." *Id.* at 39a.

SUMMARY OF ARGUMENT

The Nevada Supreme Court held that a provision of the State's recusal law violated the First Amendment by restricting voting by elected officials. After noting that some federal courts of appeals have held that voting by members of public boards is "protected speech," Pet. App. 10a, the court concluded that because elected legislators are not "public employees" whose First Amendment interests are subject to balancing under the *Pickering* test, "[s]trict scrutiny is therefore the appropriate standard," *id.* at 13a. The majority then invalidated the provision as "facially overbroad." *Ibid.* That unprecedented decision rests on a series of fundamental errors.

The premise that the First Amendment entitles local legislators to cast votes on any matter, particularly one on which private interests would materially affect their independent judgment, is alien to the American constitutional tradition and to first principles of self-government. Legislative recusal rules were well established by the time of the Founding, and not only were they never thought to

implicate individual legislators' personal constitutional rights—they were understood to reflect "fundamental principles of the social compact." Thomas Jefferson, *Manual of Parliamentary Practice* 44 (New York, Clark & Maynard 1868) (1801) ("*Jefferson's Manual*"), *available at* http://www.archive.org/stream/parliamentpractic00jef frich#page/iv/mode/2up. Such rules confirm that the delegated powers of legislative office have never been understood to include the power to act when the member has a disqualifying conflict of interest. Indeed, legislative voting is not principally expressive but is properly viewed as a governmental act, an incident of office that is a public trust held for the sole benefit of the people, whose powers must be exercised consistently with the neutral limitations under which they were granted. Neutral restrictions on a legislator's vote do not involve "loss of any private right," *Raines* v. *Byrd*, 521 U.S. 811, 821 (1997), much less loss of a free speech right. Recognition of a personal First Amendment right to vote is inconsistent with the discretion the Court traditionally has afforded States to structure their systems of government, even when their choices affect individual legislators' voting power, and inconsistent with other longstanding legislative rules.

Even if generally applicable, content-neutral recusal rules were properly viewed as raising any First Amendment concern, there is no basis for applying heightened scrutiny, let alone strict scrutiny—the most demanding test known to constitutional law. Strict scrutiny is not the default mode for reviewing every law that affects expression, but is reserved for laws that regulate speech based on its content or communicative effect and pose a real

risk of suppressing expression. In a variety of contexts, this Court has upheld content- and viewpoint-neutral measures that have an incidental effect on expression where they are reasonable and serve important state interests.

The Nevada recusal statute easily satisfies that standard. It is a neutral rule that serves fundamental governmental objectives in safeguarding the integrity of decisionmaking that are unrelated to the suppression of speech and apply without regard to what viewpoint a legislator might seek to express. Because the statute governs the threshold determination of eligibility to vote, it stands a step removed from whatever expressive content a vote may have. Any burden on free speech rights is very limited in light of the fact that voting does not primarily serve an expressive function and has always been subject to recusal restrictions. The free speech rights public officials enjoy as citizens outside the legislature are entirely unaffected. And because there is no reason to believe that recusal rules will cause legislators to miss substantially more votes than they ordinarily would for any number of other reasons unrelated to recusal, there is no reason to believe their constituents will suffer any cognizable, let alone "severe," burden. Recusal rules also are valid as a traditional, viewpoint-neutral restriction preventing access to the nonpublic forum of legislative voting by those who have a disqualifying conflict of interest.

Applying heightened scrutiny would needlessly endanger a wide range of recusal provisions. The Nevada Supreme Court's rationale would mandate applying strict scrutiny to every recusal provision

governing an elected public officer's voting on matters of public interest. Indeed, because the court's reasoning did not turn on any distinctive aspect of legislative office, it would apply to executive and judicial actions with as much expressive content as voting. And its rationale would equally apply to appointed officials, whose conduct reflects on the elected officials who placed them in office. Even if most such recusal provisions are ultimately upheld, inappropriately stringent scrutiny imposes burdensome defense costs, wastes judicial resources, and unjustifiably constrains the ability of state and local governments to pursue important objectives.

The errors of the court below were enabled and compounded by its misapplication of First Amendment overbreadth doctrine. Far from being constitutionally "overbroad," the provision invalidated below only extends the recusal requirement to circumstances "substantially similar" to four familiar bases for recusal enumerated in the statute (involving members of the officer's household, relatives, employers, and substantial and continuing business relationships). The text of the statute is itself clear, and the decision below did not identify or even plausibly hypothesize instances, let alone a substantial number of them, where protected activity would be punished. Indeed, the court ignored that the core rationale for allowing "overbreadth" challenges by persons like respondent—whose conduct fell "squarely within" the statute, Pet. App. 68a—was not even present here: Those whose rights could potentially be "chilled" by supposed overbreadth have recourse to an advisory opinion mechanism to clarify whether the law applies to their conduct. Finally, to the extent the "overbreadth"

holding reflects substantive disagreement with the Nevada Legislature as to when to require recusal, such objections do not sound in the First Amendment.

ARGUMENT

THE NEVADA SUPREME COURT FUNDAMENTALLY ERRED BY APPLYING STRICT SCRUTINY TO THE STATE'S GENERALLY APPLICABLE, CONTENT-NEUTRAL RECUSAL STATUTE

As Justice Pickering noted in dissent, the Nevada Supreme Court's decision "opens the door to much litigation and little good." Pet. App. 39a. Although the majority brushed aside those concerns, the necessary implications of its holding are breathtaking. Were this Court to embrace the conclusion that elected officials' votes are protected political speech and that even content- and viewpoint-neutral regulations are subject to strict scrutiny, it would immediately render presumptively unconstitutional bedrock conflict-of-interest rules in virtually every State, including basic legislative recusal provisions that have been an accepted and necessary part of representative self-government since before the ratification of the First Amendment. Even if the vast majority of such regulations ultimately were upheld, forcing States to litigate the constitutionality of such rules under the intensely skeptical and costly strict scrutiny standard would drastically—and needlessly—constrain their ability to adopt and enforce basic rules for self-government. Nothing in the First Amendment supports that result, and much condemns it.

A. State And Local Legislators Have No Personal "Free Speech" Right To Cast Votes On Particular Matters, Much Less Ones In Which They Have A Personal Interest

The majority below cited no decision of any court that had ever invalidated a generally applicable conflict-of-interest recusal rule, nor are we aware of any prior decision of any court concluding that such laws even implicate First Amendment rights. That omission is telling. The absence of such precedent reflects the fact that the Nevada recusal provision is part of a "universal and long-established tradition" of requiring legislators to recuse themselves from matters implicating private interests, which "creates 'a strong presumption' that the [measure] is constitutional." *White*, 536 U.S. at 785 (internal quotation marks omitted).

1. It is a basic fact of legislative practice that "[d]eliberative bodies can scarcely function" without rules. David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* at 9 (1997). As Thomas Jefferson noted in the *Manual of Parliamentary Practice* that he compiled when serving as Vice President (and President of the Senate), such rules promote important interests of "accuracy in business, economy of time, order, uniformity, and impartiality." *Jefferson's Manual* vi. They also provide protection from the misuse of power. See *id.* at 13. It is thus unsurprising that "one of the first acts of each House [of Congress] was to adopt them," Currie, *supra,* at 9, pursuant to explicit constitutional authority providing that

"[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5.

One of the most fundamental of those rules restricts legislators from acting when they have a disqualifying private interest. Such recusal rules have been mainstays of this country's legislatures since the Founding. On April 7, 1789, within a week of first achieving a quorum, the House of Representatives adopted with its first set of rules a provision requiring that "[n]o member shall vote on any question, in the event of which, he is immediately and particularly interested." 1 Annals of Cong. 104 (1789). Although the first Senate Rules did not initially include a recusal requirement, Thomas Jefferson, as President of the Senate, adopted one based on parliamentary best practices that proved influential for decades to come: "Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed, even after a division." *Jefferson's Manual* 44.

There is no indication that those serving in Congress at the time understood legislative recusal rules even to implicate the First Amendment, let alone to offend it. "Nobody" in the First Congress—which itself framed and proposed the First Amendment—"is recorded as objecting" that the House rules "unconstitutionally limited the rights of individual members." Currie, *supra*, at 10. Far from it: Jefferson described the necessity of recusal rules as inherent in the nature of public office:

> In a case so contrary not only to the laws of decency, but to the fundamental principles of the

> social compact, which denies to any man to be a judge in his own cause, it is for the honour of the House that this rule of immemorial observance should be strictly adhered to.

Jefferson's Manual 44. See generally *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (early practice in Congress "provides contemporaneous and weighty evidence of the Constitution's meaning") (internal quotation marks omitted); accord *Eldred* v. *Ashcroft*, 537 U.S. 186, 213 (2003). Indeed, the view that offices were a trust to be used for public benefit, and the need for measures to ensure that governmental power would not be exercised by individuals with distinct private interests, were recurring topics of the Constitutional Convention, which were embodied in a number of constitutional provisions. See, *e.g.*, Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 354-363 (2009).

The need for legislative recusal was widely accepted throughout the nineteenth century,[5] and

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[5] See, *e.g.*, Aaron Clark, *Manual, Compiled & Prepared for the Use of the Assembly* 99 (1816) ("Where the private interests of a member are concerned in a bill or question, he is to withdraw."); Luther S. Cushing, *Rules of Proceeding & Debate in Deliberative Assemblies* 30 (1848) ("No member ought to be present in the assembly, when any matter or business concerning himself is debating; nor, if present, by the indulgence of the assembly, ought he to vote on any such question."); John A. Smull, *Smull's Legislative Hand Book* 138 (1875) ("A member who has a personal or private interest in any measure or bill * * * shall disclose the fact and * * * shall not vote thereon."); George T. Fish, *American Manual of Parliamentary Law* 13 (1880) ("PRIVATE RIGHT * * * being involved, the member concerned has no right to vote."); George G. Crocker, *Principles of Procedure in Deliberative Bodies* 103 (1889) (member's "vote

such rules remain a basic part of most States' governing principles today. Virtually every State has enacted conflict-of-interest regulations for legislators.[6] The vast majority require public officials not to vote on matters presenting a conflict of interest. See Office of Legislative Research, Conn. Gen. Assembly, 2000-R-0155, *Voting Restrictions in State Ethics Codes* (Feb. 2000) (37 States), http://www.cga.ct.gov/2000/rpt/2000-R-0155.htm. While most States' bases for disqualification have evolved from common law standards focused on direct pecuniary interest at the time of the Founding through the nineteenth century to more precise codes encompassing officials' relatives and business associates,[7] there has never been an expectation that

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should not be allowed upon any question" where he has "interests distinctly from" the public); *Coles* v. *Trs. of Williamsburgh*, 10 Wend. 659, 666 (N.Y. Sup. Ct. 1833) ("Two of the [village trustees] being interested, were incompetent to act upon this question."); *In re Town of Nashua*, 12 N.H. 425, 430 (1841) ("If one of the commissioners be interested, he shall not serve."); *Comm'rs Court* v. *Tarver*, 25 Ala. 480, 481 (1854) ("If any member of [the Commissioners' Court of Roads and Revenue] has a peculiar, personal interest, such member would be disqualified from taking part in the deliberations."); *Mayor of Montezuma* v. *Minor*, 73 Ga. 484, 490 (1884) ("[where an alderman] is pecuniarily or personally interested in the issue, let him retire from the [council], and let the mayor and remaining aldermen, who have no more interest in the question than that of any other good citizen of the town, proceed").

[6] See National Conference of State Legislatures, *Voting Recusal Provisions* (last updated Oct. 2009), http://www.ncsl.org/?TabId=15357.

[7] *E.g.*, Conn. Gen. Stat. § 1-85 (2010) (originally enacted as Conn. Gen. Stat. § 1-68 (1958)); N.J. Stat. Ann. § 52:13D-18 (2010) (originally enacted as L.1971, c.182, § 7 (1967)); Ariz.

legislators were entitled—let alone enjoyed a constitutionally protected right—to cast votes on matters about which they had a disqualifying conflict of interest under current law.

2. This long-held understanding that lawmakers must abstain from acting on matters in which they have an interest is inconsistent with the idea that legislators have a personal "right" derived from the Constitution to vote even when they have a conflict of interest. Rather, it attests that voting is properly viewed principally as a governmental act, an incident of an office that is itself "a public trust * * * held for the sole benefit of the people," Nev. Rev. Stat. § 281A.020(1) (2009), such that the vote must be exercised consistently with the limitations under which it was granted. "Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." *City of Eastlake* v. *Forest City Enters.*, 426 U.S. 668, 672 (1976). When the people of a State authorize the creation of municipal bodies, they delegate to them the power to enact binding laws. Where, as here, elected legislators are subject to a recusal provision, it is a clear indication that the grant of government authority does not include the power to vote on matters on which the member has a conflict of interest.

Rules like this one, to maintain "integrity in the discharge of official duties" and prevent the misuse of

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Rev. Stat. Ann. § 38-503 (2011) (originally enacted Ariz. Rev. Stat. Ann. § 38-503 (1968)); Ala. Code § 36-25-1 (2011) (originally enacted Ala. Code § 36-25-1 (1973)).

office for private ends, *Ex parte Curtis*, 106 U.S. 371, 373 (1882), are fundamentally no different from familiar rules that prevent officeholders from using their government telephones or office space for personal business. *E.g.*, Nev. Rev. Stat. § 281A.400(7) (2009) (with certain exceptions, providing that "a public officer or employee shall not use governmental time, property, equipment or other facility to benefit the public officer's or employee's personal or financial interest"); *id.* § 281A.400(8) (2009) (same, respecting state legislators); cf. 18 U.S.C. § 607 (prohibiting solicitation of donation for elections from a person "located in a room or building occupied in the discharge of official duties by an officer or employee of the United States"); *United States* v. *Thayer*, 209 U.S. 39, 44-45 (1908) (Holmes, J.) (upholding conviction under predecessor of § 607, noting that "the [constitutional] power" to prohibit "is not in dispute"). Even if such a rule prevents an official from using government resources for "high value" political speech, neutrally restricting the use of such property to official business implicates no First Amendment right. Similarly, provisions restricting federal officials from having potentially conflicting outside business interests, which have been in force since "the first session of the first Congress," have never been thought to offend the Constitution. *Curtis*, 106 U.S. at 372-373 (discussing legislation prohibiting outside business interests enacted between 1789 and 1868 and noting "this is the first time the constitutionality of this legislation has ever been presented for judicial determination").

3. Legislators do not have an individual free speech right to vote on *any* particular matter. While "a voter's franchise is a personal right," "[t]he

procedures for voting in legislative assemblies * * * pertain to legislators not as individuals but as political representatives executing the legislative process." *Coleman* v. *Miller*, 307 U.S. 433, 469-470 (1939) (Frankfurter, J., concurring). Thus, to the extent that casting a vote in a legislative body "arguably contains a communicative element, the act is quintessentially one of governance." *Spallone*, 493 U.S. at 303 n.12 (Brennan, J., dissenting). This Court accordingly has held in the standing context that statutes that "alter[ed] the legal and practical effect of [legislators'] votes" did not involve "loss of any private right." *Raines*, 521 U.S. at 821. As then-Judge Scalia explained, with respect to federal officials:

> no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold. * * * They have a private right to the office itself, and to the emoluments of the office, but the powers of the office belong to the people and not to them.

Moore v. *U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) (citations omitted).

The notion that legislators have an individual free speech-based right to vote is inconsistent with the broad discretion this Court traditionally has afforded each State to "structure its political system," *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 13-14 (1982), and the "substantial deference" given to

the choices States make. *Id.* at 8; see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 462-463 (1991) (recognizing "a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders"). See generally Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 51 (2004) ("A boundary must exist between questions treated as matters of institutional design and those treated as matters of individual rights; otherwise, mechanical application of rights doctrines to democratic processes will consume institutional-design options states legitimately ought to have.").

The Court repeatedly has accorded deference even if the State's choices affect individual legislators' voting power. Thus, there is no constitutional requirement that States provide that *any* governmental decisions be made at the local level, or that such matters be decided by vote (as opposed to an administrator's decision), see, *e.g.*, *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 140 (2004); *Presley* v. *Etowah Cnty. Comm'n*, 502 U.S. 491, 507-508 (1992) (changes in "powers of some official responsible to the electorate" are "a routine part of governmental administration"). Nor is there any requirement that decisions be made by simple majority (as opposed to supermajority) vote, *Gordon* v. *Lance*, 403 U.S. 1, 6 (1971), or by a vote of the entire body (as opposed to a committee). Cf. *Davids* v. *Akers*, 549 F.2d 120, 123-124 (9th Cir. 1977) (rejecting First Amendment challenge to committee assignment practices that made it effectively impossible for legislators affiliated with minority

party to vote on, much less enact, legislation opposed by majority party).

Moreover, casting a legislative vote "does not involve any 'interactive communication,' and is 'not principally' a method of 'individual expression of political sentiment.'" *Doe* v. *Reed*, 130 S. Ct. 2811, 2830 (2010) (Stevens, J., concurring in part and in the judgment) (citation omitted) (discussing referendum petitions); cf. *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression."); *Burdick* v. *Takushi*, 504 U.S. 428, 438-439 (1992) (function of elections is to select candidates, and State need not let them be used as "'a forum for continuing intraparty feuds'") (quoting *Storer* v. *Brown*, 415 U.S. 724, 735 (1974)). Indeed, what an official's legislative vote "means"—apart from that a measure is one vote closer to passage—is no simple matter: the member could personally support its aims; he could be expressing the views of his constituency or a subset of potential swing votes; he could be voting in compromise on the measure with the best chance of enactment, or voting for a measure he does not support to encumber disfavored legislation with an unpopular provision; he could be currying favor with other members or party leadership in the hope they will advance other legislative measures or his career. Frequently, "[t]he expressive component of a [legislator's vote] is not created by the conduct itself but by the speech that accompanies it." Cf. *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47, 66 (2006).

The notion that the First Amendment affords lawmakers individual protection for their votes is inconsistent with bedrock assumptions about legislative voting that date to the Founding. If voting were speech, the requirement that individual votes be recorded would be suspect under *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995); cf. *Doe*, 130 S. Ct. at 2833-2834 (Scalia, J., concurring). State constitutional and statutory provisions requiring that all legislative meetings be public, *e.g.*, Nev. Const. art. 4, § 15, likewise would be constitutionally suspect. The same would be true of the practice, itself dating to the Founding, of assigning legislation to committees, which often denies those not on the committee any opportunity to vote on certain bills. But see *Davids*, 549 F.2d at 123 (rejecting First Amendment challenge to committee assignment practices that allegedly made it effectively impossible for minority party to enact legislation). See generally Currie, *supra*, at 9-10 (recognizing First Congress's use of committees); cf. *Jefferson's Manual* 112 (limiting power to move for reconsideration to members who voted with the prevailing side).

Of course, if *voting*, which at most has a modest "communicative element," is robustly protected "political speech," then restrictions on what legislators may say on the floor of the legislature would be immediately suspect. But legislative bodies have since the Founding employed *content-based* restrictions on speech. Thus, there have long been restrictions on "indecent language," disparaging other members, or even referencing them by name. *Jefferson's Manual* 40; see also Rule XVII, *Rules of the House of Representatives*, 112th Cong. (2011). Such restrictions, which could never be applied to the

speech of a member of the public, *Cohen* v. *California*, 403 U.S. 15 (1971), have never been thought to offend the First Amendment, Currie, *supra*, at 9-10; *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 681-682 (1986) ("In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate."), underscoring that what is at issue here is not a personal right.[8]

The majority below purported to derive a broad, personal free speech right to vote from lower court cases involving claims by local legislators who alleged they were subject to retaliation because of how they had voted on certain issues. See Pet. App. 10a (citing *Colson* v. *Grohman*, 174 F.3d 498 (5th Cir. 1999), and

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[8] *Bond* v. *Floyd*, 385 U.S. 116 (1966), on which respondent relies, see Br. in Opp. 2, 8, 12-13, did not involve legislative voting—or even legislative speech. There, the Court invalidated a punishment—denial of an office—based on disapproval of the viewpoint of a legislator's speech as a citizen (opposing the Vietnam War). Cf. *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006) (noting First Amendment imposes limits on government's power to "leverage the employment relationship to restrict * * * liberties employees enjoy in their capacities as private citizens"). The Court reasoned that the First Amendment would plainly protect the statements in question had they been "made by a private citizen," *Bond*, 385 U.S. at 135, and concluded that the plaintiff's status as a legislator-critic should not alter his rights. *Ibid.* While the opinion may be read to assume that viewpoint suppression within the legislature would be suspect, it stopped far short of any suggestion that the First Amendment prevents States from enforcing general rules requiring officeholders to abstain from voting for conflict of interest or similar content-neutral reasons.

Miller v. *Town of Hull*, 878 F.2d 523 (1st Cir. 1989)).[9] The reasoning of those decisions is questionable. But even accepting them as correct, the fact that the First Amendment limits government's power to punish officials based on the way they voted does not mean that legislators have a personal Free Speech right to vote on all matters that come before the body on which they serve. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381-382 (1992) (absence of First Amendment protection for "fighting words" does not permit content-based punishment); cf. *Regan* v. *Taxation With Representation*, 461 U.S. 540, 548 (1983) (freedom to make funding decisions does not

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[9] Indeed, the vast majority of cases respondent cited in his brief in opposition to establish that the Free Speech Clause protects voting likewise involved claims of retaliation, Br. in Opp. 8-9 (citing *Colson*; *Miller*; *Blair* v. *Bethel Sch. Dist.*, 608 F.3d 540 (9th Cir. 2010) (finding no cause of action); *Velez* v. *Levey*, 401 F.3d 75 (2d Cir. 2005); *Camacho* v. *Brandon*, 317 F.3d 153 (2d Cir. 2003); *Stella* v. *Kelley*, 63 F.3d 71 (1st Cir. 1995)), or claims of compelled speech of dubious validity in light of the small risk that local legislators required to implement federal law would be understood to endorse it. Br. in Opp. 8-9 (citing *Clarke* v. *United States*, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990)); but see *Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting). The other cases cited do not assist respondent. See Br. in Opp. 17-18 (citing *DeGrassi* v. *City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (upholding exclusion of council member from meetings on matter on which she had interest as viewpoint-neutral restriction on access to nonpublic forum that did not violate her First Amendment rights); *id.* at 19-20 (citing *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997) (involving challenge based on "First Amendment associational rights" and equal protection to application of "a [recusal] standard specific to Peeper that treats her differently than other Board members")).

extend to viewpoint suppression). The existence of a constitutional rule against viewpoint-based discrimination would not establish that the First Amendment obliges States to open legislative voting on every matter to all members, even those who have a conflicting private interest in a particular matter before the body. Recusal statutes operate "based on the *status*" of legislators "rather than their views." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

B. Neutral Recusal Provisions Are Subject To Review For Reasonableness

Not only did the decision below err in assuming that local legislators have a First Amendment right to cast votes, even in defiance of generally applicable conflict-of-interest recusal requirements, but it erred further in concluding that such laws are subject to strict scrutiny, the most demanding standard known to constitutional law.

Even if legislative voting, like much conduct, has an expressive element, it does not follow that strict scrutiny is the appropriate standard to apply to recusal rules. This Court traditionally has reserved strict scrutiny for measures that target the communicative impact of speech and expressive acts. See, *e.g.*, Laurence H. Tribe, *American Constitutional Law* 791-792 (2d ed. 1988); *McIntyre*, 514 U.S. at 345-346 (applying strict scrutiny to a "regulation of pure speech"); *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (applying strict scrutiny to a "facially content-based restriction on political speech in a public forum"); *id.* at 217 (Stevens, J., dissenting) (same). Strict scrutiny is warranted

under such circumstances because of the inherent dangers such measures pose to the free exchange of ideas and information. Regulations that are not aimed at ideas or information, but which have an incidental effect on expression, are "of a different order altogether." Tribe, *supra*, at 791. Under such circumstances, this Court does not require a showing of a compelling governmental interest or narrow tailoring. In a variety of contexts, the Court has upheld such regulations where they are reasonable and nondiscriminatory, advance important governmental interests unrelated to expression, and do not burden substantially more speech than necessary to further the government's interests. See, *e.g.*, *Burdick* v. *Takushi*, *supra*; *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666 (1998); *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). The recusal provision of the Nevada Ethics in Government Law easily satisfies that standard.[10] Only when a challenger establishes that a regulation

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[10] The majority below assumed that strict scrutiny applied to this case unless it was governed by the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), for employee speech. But *Pickering* is only one of many instances in which this Court has rejected the application of strict scrutiny to government action that affects expression. Indeed, *Pickering* involves a relatively demanding test, consistent with the fact that the government actions to which it applies are content- and viewpoint-based restrictions on speech as citizens on matters involving public concern. Whether or not *Pickering* is the most apt doctrinal analogy for this case, which involves no government effort to punish the content of speech, it is noteworthy that this Court rejected application of strict scrutiny, and that the two judges below who considered *Pickering* balancing concluded that the test would be readily met here.

imposes "severe" burdens does strict scrutiny apply. See *Burdick*, 504 U.S. at 434.

1. The Nevada Recusal Statute Is Content Neutral And Nondiscriminatory

Nevada's recusal statute is not a regulation of pure speech, nor is it aimed at any expressive content of voting. Rather, like other rules to maintain "integrity in the discharge of official duties" and prevent the misuse of office for private ends, see *Curtis*, 106 U.S. at 373, recusal rules promote state interests unrelated to the suppression of ideas. Recusal rules embody the principle that "no man may serve two masters," in "recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." *United States* v. *Miss. Valley Generating Co.*, 364 U.S. 520, 549 (1961). Because of the difficulty of determining in any case whether private interests or public duties motivated an official's exercise of government power, the standards are ordinarily described in objective, probabilistic terms—the *risk* that a given relationship or arrangement would lead a reasonable official in the same position to decide based on private interests. *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927). Recusal rules promote important government objectives by reducing the influence of private interests on decisionmaking and thus help safeguard the integrity and efficiency of government. David Oretlicher, *Conflicts of Interest and the Constitution*, 59 Wash. & Lee L. Rev. 713, 720 (2002); cf. *Curtis*, 106 U.S. at 372-373 (noting long history of federal regulation of officeholders' business interests);

Rosario v. *Rockefeller*, 410 U.S. 752, 761 (1973) ("It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal.").

The interests favoring recusal rules are particularly compelling in the context of voting by members of city councils and other municipal bodies. "Unlike the [Nevada] Legislature, which performs strictly legislative functions, a local government body performs administrative functions as well." *Nevadans for Prot. of Prop. Rights, Inc.* v. *Heller*, 141 P.3d 1235, 1248 (Nev. 2006). Thus, a Nevada municipal government both acts as a legislature, "promulgating policy-type rules or standards," and applies those standards in administrative "proceedings designed to adjudicate disputed facts in particular cases." *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 245 (1973); see also *Eller Media Co.* v. *City of Reno*, 59 P.3d 437, 439-440 (Nev. 2002) (per curiam). As this Court has recognized, when a local body performs an administrative function, it is subject to heightened due process standards, including the requirement of an impartial decisionmaker. In both their principles and their operation, these rules are similar to those governing judicial disqualification.[11]

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[11] See *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) ("'[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators'") (quoting Kenneth C. Davis, *Administrative Law Text* § 12.04, at 250 (1972)); see *Londoner* v. *City & Cnty. of Denver*, 210 U.S. 373, 385-386 (1908) (administrative action, unlike legislative action, requires individual hearings); cf. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828 (1985) ("Congress and the states, of course, remain free to impose more rigorous standards for judicial

This Court has repeatedly upheld neutral state rules adopted to regulate the processes of self-government, emphasizing that such rules are ordinarily subject to deferential review even if they necessarily burden interests protected by the First Amendment. In *Burdick* v. *Takushi*, for example, this Court rejected application of strict scrutiny to Hawaii's prohibition on write-in voting during elections, although it acknowledged that it "ha[d] an impact on the right to vote," a right "'of the most fundamental significance,'" 504 U.S. at 433-434, and potentially burdened expression and association, *id.* at 436-437. The Court emphasized that the regulation furthered interests unrelated to the suppression of ideas by ensuring that elections are "fair and honest" and orderly. *Id.* at 433 (internal quotation marks omitted). Based on similar reasoning, this Court has repeatedly rejected strict scrutiny and upheld other restrictions on citizen voting, notwithstanding burdens on First Amendment associational rights. See, *e.g.*, *Clingman* v. *Beaver*, 544 U.S. 581, 593 (2005) (upholding law limiting primary election to party members and independents because it imposes only "minor barriers between voter and party" and "advances a number of regulatory interests"); *Rosario*, 410 U.S. at 756-762 (upholding requirement that voters enroll as members of a party before voting in primary).

This Court has likewise repeatedly rejected strict scrutiny when reviewing state regulations on

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disqualification than those we find mandated [by the Due Process Clause]."); *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2268-2269 (2009) (Roberts, C.J., dissenting) (same).

candidates' access to ballots, even while recognizing that they "burden[ed] * * * First and Fourteenth Amendment associational rights," *Timmons*, 520 U.S. at 363, where they served government interests in "integrity, fairness, and efficiency" unrelated to the suppression of speech. See *id.* at 364; accord *Storer* v. *Brown*, 415 U.S. 724, 730-737 (1974). The Court also has upheld neutral laws requiring a threshold showing of public support before a candidate's name will be placed on a ballot, recognizing that First Amendment associational rights "are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively." *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 193 (1986); accord *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

Thus, where a statute does not "directly and substantially burden the * * * communicative aspect" of an activity, but rather "impos[es] only indirect and less substantial burdens on communication," the provision "should be subject to review for reasonableness" under the standard of *Burdick*. *Buckley* v. *Am. Constitutional Law Found.*, 525 U.S. 182, 216 (1999) (O'Connor, J., concurring in judgment in part and dissenting in part); accord *Doe*, 130 S. Ct. at 2827-2828 (Sotomayor, J., concurring). Where, as here, the only even arguable burdens on First Amendment rights derive from "reasonable, nondiscriminatory restrictions," "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983)).

2. Heightened Scrutiny Is Neither Necessary Nor Appropriate Here

These principles cast into sharp relief the error of the decision below. Nevada's recusal statute is not a regulation of pure speech, nor is it based on or aimed at the expressive aspect of any vote to which it applies. Rather, its application turns solely on whether the public official has a private interest in a matter because of his personal financial interests or his relationships with others. Neither the provision nor the Commission's enforcement of it is concerned with the "side" of the issue the officeholder seeks to support. That is well illustrated here: the Nevada law required the recusal of both Councilman Carrigan (who had ties through Vasquez to the Lazy 8) and Councilman Salerno (who had ties through his business forms company to the Nugget).

It is likewise immaterial what "message" an official might seek to express with his vote, from outright support or opposition to the measure, to willingness to compromise, to a simple desire for reelection. The statute is solely concerned with the objective fact of the official's relationships with interested persons, and whether a private interest in the matter would affect the judgment of a reasonable person in the official's situation. Nev. Rev. Stat. § 281A.420. Because the statute is "justified without reference to" any expressive content of a vote, it is content-neutral. *Ward*, 491 U.S. at 791 (internal quotation marks omitted); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 655 (1994) (regulation was content neutral where it was "not activated by any particular message").

There is no risk that application of the recusal provision will result in a "severe" restriction of free speech. Because such a provision simply helps make the threshold determination whether a legislator is *eligible* to vote, without regard to how he might cast his vote if permitted, it "'stand[s] a step removed from the communicative aspect of [voting].'" See *Doe*, 130 S. Ct. at 2828 (Sotomayor, J., concurring) (quoting *Buckley*, 525 U.S. at 215 (O'Connor, J., concurring in judgment in part and dissenting in part)). Any impact on expression it may have is thus merely "incidental," *FAIR*, 547 U.S. at 62.

The interests advanced by recusal provisions are important ones. See pp. 33-34, *supra*. Indeed, recusal rules have long been recognized as among the "fundamental principles of the social compact." *Jefferson's Manual* 44. By contrast, any burden imposed by the Nevada recusal rule is "a very limited one." *Burdick*, 504 U.S. at 437. It cannot credibly be maintained in the face of a widespread, centuries-old prohibition that there is a right to vote in matters on which a member has a conflict of interest; indeed, respondent conceded as much below. Appellant's Nev. S. Ct. Br. 13. Moreover, while legislative voting may, like most conduct, have an expressive character, expression is not its primary purpose. As noted above, see p. 27, *supra*, voting "serve[s] primarily" to determine which measures will be adopted, "not as [a] forum[] for political expression." *Timmons*, 520 U.S. at 363 (discussing election ballots). Because voting does not primarily serve an expressive function, the State may validly adopt measures to safeguard the integrity of lawmaking, even if doing so may impose incidental burdens on officials' use of voting for personal expression. Cf. *Burdick*, 504 U.S.

at 438 ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.").

Moreover, it bears emphasis that the legislative recusal provision in no way burdens the First Amendment rights respondent enjoys outside the City Council as a citizen. He remains free to communicate his views to his constituents and the public through public speaking, television appearances, newsletters, pamphlets, advertisements, telephone calls, personal visits, and emails. The rule's lack of impact on these traditional channels of communication underscores that the recusal rule is not aimed at suppressing information or disfavored ideas. Cf. *Ward*, 491 U.S. at 802 (noting requirement of "ample alternative channels of communication" in time, place, or manner restriction case). Nevada's recusal statute is concerned with officials' exercise of official powers, not the exercise of their freedom of speech. Cf. note 8, *supra*.

Nor does Nevada's recusal statute unconstitutionally burden the rights of respondent's constituents (who are, in any event, not parties to this case). See Br. in Opp. 19. This Court has never intimated that citizens have a broad constitutional right to have their representatives vote on matters in which they have a disqualifying private interest. The fact that citizens may find themselves without a voting representative for many reasons besides disqualification—death, resignation, illness, scheduling conflicts, or simple failure to vote—suggests that recusal provisions will not cause citizens to suffer an unusual deprivation of voting representation. Moreover, this Court has said that

States are to be afforded "substantial deference" in determining how to fill vacancies, *Rodriguez*, 457 U.S. at 8, suggesting that the Constitution would tolerate a reasonable delay in appointing or electing a successor—during which time, constituents would be without representation for a far greater number of votes than would reasonably be at issue under the recusal statute. This Court saw no issue with constituents being without a representative *they had elected* for substantial periods, *id.* at 11 & n.11 (29 months), or with having the interim official appointed by a party rather than a politically accountable elected official. *Id.* at 12. No serious challenge has been mounted against the common practice of a State's governor making interim appointments, even though it sometimes results in an interim officeholder of a different political party than the one voters elected.

Finally, there is no indication that Nevada's recusal statute is framed so broadly as to require constant recusals that might deny representation in a large number of matters. See J.A. 196 (Councilman Carrigan testifying that he has recused himself only once). Rather, the effect of the recusal provision is "minimal," and there is no reason to believe that the effect of recusal would fall disproportionately on any set of constituents. *Rodriguez*, 457 U.S. at 12; *Doe*, 130 S. Ct. at 2830 (Stevens, J., concurring in part and concurring in the judgment) (in upholding statute, noting "the amount of speech covered is small") (internal quotation marks omitted).

While respondent argues that the Lazy 8 project was "of the utmost importance" to respondent's constituents, Br. in Opp. 18, it is to be expected that

elected representatives may occasionally miss even important votes for a variety of reasons—including a feeling that recusal is necessary under the circumstances. Indeed, respondent testified that he would have felt a need to abstain "[i]f it would have been a relative" representing the Lazy 8. J.A. 214. In any event, the importance of this particular vote is not relevant in considering the propriety of the *facial* invalidation of the recusal statute. Accordingly, the effect of the recusal statute on respondent's constituents raises no constitutional concern.

C. The Nevada Recusal Statute Is A Reasonable Regulation Of The Forum Of Legislative Voting

In addition, the Nevada Recusal Statute can be sustained as a reasonable regulation of the forum of legislative voting. "Even protected speech is not equally permissible in all places and at all times." *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985). "'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Greer* v. *Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderly* v. *Florida*, 385 U.S. 39, 47 (1966)). Thus, "[t]he government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Forbes*, 523 U.S. at 677-678 (quoting *Cornelius*, 473 U.S. at 800). A nonpublic forum is created by permitting "selective access, unsupported by evidence of a purposeful designation for public use." *Id.* at 680 (quoting *Cornelius*, 473 U.S. at 805). In nonpublic forums, the government

retains the choice of whether to reserve the forum "for specified classes of speakers." *Ibid.*

Nevada municipal council voting is appropriately considered a nonpublic forum. Access to it is selective—it is traditionally restricted to legislators (and non-recused legislators at that). It is immaterial that restrictions on access to legislative voting are not property-based; this Court repeatedly has applied forum analysis to "access to a particular means of communication." *Cornelius*, 473 U.S. at 788 (holding that the Combined Federal Campaign, a charity drive for federal employees, was a nonpublic forum) (collecting authorities); cf. *Burdick*, 504 U.S. at 439 (State may determine that "'[t]he general election ballot . . . [is] not a forum for continuing intraparty feuds'") (quoting *Storer*, 415 U.S. at 735); *Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as forums for political expression."); *Doe*, 130 S. Ct. at 2830 n.1 (Stevens, J., concurring in part and concurring in the judgment) (referendum petition "is a state-created forum with a particular function"). Indeed, the Agenda for the Sparks City Council meeting on the night of the Lazy 8 vote noted that "[t]he meetings conducted by the Sparks City Council * * * are not public forums." J.A. 10. That conclusion would apply a fortiori to the voting that occurs there.

There can be little question that the Nevada Recusal Statute is "reasonable in light of the purpose of the [forum]." *Forbes*, 523 U.S. at 682. Over two centuries of practice attest to the reasonableness of such restrictions, which, as noted above, serve legitimate viewpoint-neutral purpose of limiting the exercise of governmental lawmaking power to

officials who have no conflicting interests with respect to the matter at hand. That is a valid reason for restricting access to nonpublic forums. Cf. *Greer*, 424 U.S. at 839 (prohibition on political rallies at military base served valid purpose of insulating the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates"); *Cornelius*, 473 U.S. at 809 ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (restriction on access to advertising space on city transit serves "reasonable legislative objective[]" of preventing "the appearance of [political] favoritism"). Thus, legislators who have a conflict of interest are properly excluded from legislative voting; exclusion is "based on the[ir] *status* * * * rather than their views." *Perry Educ. Ass'n*, 460 U.S. at 49. "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 811.

D. Applying Heightened Scrutiny Would Needlessly Burden Neutral Ground Rules For The Operation of Government

Ostensibly, the Nevada Supreme Court's decision addressed only subsection 8(c) of the recusal provision of the Ethics in Government Law, Nev. Rev. Stat. § 281A.420, in the context of elected legislators. But its rationale, if accepted, would have broad ramifications for recusal provisions applicable to officials in all branches of government nationwide. Even if the vast majority of such rules ultimately are

upheld, forcing States to litigate the constitutionality of such rules under heightened scrutiny would drastically—and needlessly—constrain their ability to adopt and enforce basic rules for self-government.

1. The Nevada Supreme Court's Rule Endangers A Wide Range Of Recusal Provisions

At a minimum, the Nevada Supreme Court's rationale would mandate applying strict scrutiny to *every* conflict-of-interest provision of § 281A.420, including those applicable when a public official has received a gift or loan from an interested party or has a direct pecuniary interest in the matter. Nev. Rev. Stat. § 281A.420(2)(a), (b) (2009). Moreover, its logic would require applying strict scrutiny to *every* "statute regulating an elected public officer's protected political speech of voting on public issues." Pet. App. 11a (emphasis omitted). Although the language of recusal statutes may differ across jurisdictions, the purpose and effect of such provisions is the same everywhere: to disqualify legislators from voting on matters in which a conflict is present, thus regulating what the Nevada Supreme Court called the "protected political speech of voting." *Ibid.* Thus, the sort of legislative conflict-of-interest laws that have been commonplace in this country since the Founding would immediately become "presumptively invalid," *R.A.V.*, 505 U.S. at 382, subject to a standard designed to ensure such statutes would only "rarely" survive constitutional review. *Burson*, 504 U.S. at 199-200 (plurality opinion).

Although the Nevada Supreme Court addressed its holding to elected public officers who vote on public issues, its direct effect extends beyond legislative conflict-of-interest provisions. Indeed, the provision invalidated as facially overbroad, subsection 8(e)'s definition of the 2(c) standard, applies to all public officers, not just elected legislators. Nev. Rev. Stat. § 281A.160 (2009). The court's rationale focused on the general nature of elective office (for which, unlike civil service positions, the power to "hire [or] fire" resides with the electorate) rather than any unique characteristics of the legislative role. Pet. App. 12a (internal quotation marks omitted). Nothing in the logic of the decision suggests a basis for distinguishing elected legislators from other elected public officials. *Ibid.* Under the Nevada Supreme Court's rationale, recusal requirements governing elected judges are vulnerable because they limit the protected voting of public officers and their ability to communicate, through their votes, with the public. Cf. *Chisom* v. *Roemer*, 501 U.S. 380, 395-396 (1991) (holding, under the Voting Rights Act, that elected justices are "representatives" elected as part of the political process); *White*, 536 U.S. at 784 (suggesting that the elected judiciary is part of "the enterprise of 'representative government'"). Indeed, the principal decision on which the majority relied (Pet. App. 12a), *Jenevein* v. *Willing*, 493 F.3d 551, 557 (5th Cir. 2007), involved an elected *judge*. And the same rationale would apply equally to other elected officials who, while they do not vote, engage in governmental conduct with as much expressive content as voting—such as executive officials who must sign or veto

legislation. See *Spallone*, 493 U.S. at 303 n.12 (Brennan, J., dissenting).

Indeed, the rationale of the court below could easily be applied to politically accountable *appointed* officials, whose conduct, after all, reflects on the elected officials who appointed them. Officials at a range of federal agencies—the Federal Communications Commission, the Securities and Exchange Commission, the National Labor Relations Board—routinely act on, and even vote on, matters of significant public interest. The First Circuit (while applying the *Pickering* balancing test) has explicitly rejected the suggestion that the First Amendment permits greater restrictions on the voting of appointed officials than elected ones, calling it "a distinction without a difference," and "a wholly artificial dichotomy." *Stella* v. *Kelley*, 63 F.3d 71, 76 (1st Cir. 1995). Thus, regulations affecting the conduct of agency officials—and particularly their voting—could come within the sweep of the rule below.[12]

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[12] See, *e.g.*, 5 C.F.R. § 2635.502 (2010) (requiring employees of the Executive Branch to receive authorization before participating in matters involving a "financial interest" or "covered relationship" where the officer's impartiality could reasonably be questioned); 17 C.F.R. § 200.735-2(b) (2010) (applying Section 2635.502 to the Securities and Exchange Commission); 5 C.F.R. § 3301.101(a) (2010) (applying it to the Department of Energy).

2. Applying Strict Scrutiny To Neutral State Recusal Rules Imposes Severe Costs Even When They Are Upheld

Whatever the ultimate scope of its application, the rule below clearly subjects a broad range of neutral state rules of self-government to the most rigorous form of First Amendment review. Applying strict scrutiny to these regulations imposes a "strong presumption of invalidity," *Vieth* v. *Jubelirer*, 541 U.S. 267, 294 (2004) (plurality opinion), and will "readily, and almost always, result[] in invalidation." *Ibid.* But application of that standard imposes grave burdens on state and local governments even when the rules are ultimately upheld. As Justice Pickering noted in dissent below, applying strict scrutiny to such rules "opens the door to much litigation and little good." Pet. App. 39a. It is inevitable that sanctioned officials will go to court, particularly in light of existing incentives to litigate. See, *e.g.*, 42 U.S.C. § 1988; *NASA* v. *Nelson*, No. 09-530, slip op. 11 (U.S. 2011) (Scalia, J., concurring in the judgment) (noting that liability for damages and attorney's fees "will greatly encourage lawyers to sue, and defendants * * * to settle.").

Even unsuccessful challenges under that standard impose substantial burdens on state and local governments. First, governments bear the burden of "'show[ing] the existence of [a compelling] interest,'" *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976)), and that the rule is narrowly tailored. That necessarily requires the state or local governments to compile an evidentiary record that clearly demonstrates the necessity of their regulation,

without the benefit of deference that is usually afforded legislative fact determinations. See *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818-819 (2000). Moreover, governments will be required to demonstrate that their rules address existing, not anticipated harms, and that the rules are not prophylactic in nature. See *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). In addition to the "heavy litigation burden" that strict scrutiny imposes on state and local governments, *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), such exacting scrutiny represents a "considerable * * * intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Ibid.*; *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting) ("Claims that have little chance of success are nonetheless frequently filed."). See generally Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 495 (1996) ("The need to address the constitutionality of all such laws [that incidentally restrict speech] would impose significant costs. If, as seems likely, most of the laws would pass constitutional muster, incurring these costs does not seem worthwhile."). That is to say nothing of the judicial resources that such challenges will needlessly consume.

The rule adopted below may have the perverse effect of making States less likely to entrust such decisions to democratically elected local bodies, if they are unable to obtain the beneficial effects of local control without the risks of private influence. Cf. *Forbes*, 523 U.S. at 681-682 (noting prospect of First Amendment liability had caused organizer to cancel debates). If it would be ironic to eliminate local

control to further the public interest, it would also be unnecessary, in view of the absence of any danger that recusal rules could be used to "suppress unpopular ideas." *Turner Broad.*, 512 U.S. at 641.

E. Nevada's Recusal Requirement For Relationships "Substantially Similar" To Four Enumerated Relationships Is Not Overbroad

The court below found no infirmity in requiring recusal based on a legislator's "commitment[s] in a private capacity," nor did it conclude that Nevada's recusal statute was unconstitutional as applied to Carrigan. Pet. App. 13a n.8. Rather, the court concluded that the clause applying the recusal provision to relationships "substantially similar" to the four statutory categories (members of the official's household, relatives, employers, and business relationships, see Nev. Rev. Stat. § 281A.420(8)), was *facially* invalid because it lacked the "high level of clarity" (Pet. App. 14a) necessary to "describe what relationships are included" and thereby "adequately limit the statute's potential reach and * * * inform or guide public officers as to what relationships require recusal." *Id.* at 16a-17a. Describing § 281A.420(8)(e) as "sweep[ing] within its control a vast amount of protected speech" and producing an intolerably large "chilling effect on the exercise of protected speech," *ibid.*, the majority held that Carrigan was entitled to have the Commission's censure of him overturned, regardless of whether (as the district court found) his relationship fell "squarely within the intended scope of the statute." *Id.* at 68a. See generally *Broadrick* v. *Oklahoma*, 413 U.S 600, 610 (1975) (First Amendment overbreadth is an exception to

"traditional rule[] * * * that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others").

That conclusion reflects an untenable understanding of this Court's precedents. Facial First Amendment invalidation is "strong medicine," *Broadrick*, 413 U.S. at 613, a "last resort," *ibid.*, to be reserved for laws that, absent immediate judicial disapproval, pose a genuine threat of chilling a "substantial" quantity of constitutionally protected activity. *Id.* at 615. The opinion below disregarded those key limitations and failed even to consider the well established rule that statutes that "seek[] to regulate political activity in an even-handed and neutral manner" are "subject to a less exacting overbreadth scrutiny." *Id.* at 616. But even considered on its own terms, the decision below cannot stand.

1. The Recusal Provision Is Not Especially Broad, Let Alone Unconstitutionally *Over*broad

The court below erred from the outset because, before pronouncing subsection 8(e) facially invalid, it failed to carefully assess the challenged statute, to determine whether it in fact "chill[s] protected speech" in so "'substantial'" a number of situations that an immediate categorical prohibition against enforcement is warranted. *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). It did not identify a single instance where the provision has impermissibly punished protected activity, let alone a significant

number of such instances. *Id.* at 122 ("The overbreadth claimant bears the burden of demonstrating 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." (quoting *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 14 (1988)). Nor did it offer any basis for concluding that the provision's "very existence" has or would induce officials to refrain from protected activity. See *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). Rather, its "casual[]" (*Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999)) conclusion that the statute prohibited a "vast amount of protected speech" focused solely on the provision's purported "*potential* reach," Pet. App. 17a (emphasis added), and allegedly deficient "level of clarity." *Id.* at 14a. But "that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Vincent*, 466 U.S. at 800.[13]

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[13] The Nevada Supreme Court expressly declined to consider Carrigan's vagueness challenge. Pet. App. 6a n.4. Because this Court is one "of review, not of first view," it ordinarily would not resolve such an argument. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see also *Alabama* v. *Shelton*, 535 U.S. 654, 660 n.3 (2002). Even if Carrigan's vagueness challenge were properly before this Court, it is meritless. Unlike with overbreadth, "a plaintiff whose speech is clearly proscribed" simply "cannot raise a successful vagueness claim * * * for lack of notice." *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010). Carrigan's longstanding professional association with Vasquez, Vasquez's ongoing service as campaign manager for Carrigan's 2006 ongoing reelection effort (whose two elections straddled the City Council's meeting on the Lazy 8), and the campaign's extensive business ties with

Even considering its "potential reach," neither the text nor experience supports the conclusion that the "substantially similar" language of subsection 8(c) is especially "sweeping." The provision has been referenced only a handful of times in Commission opinions, and the Commission is not aware of a large number of officials citing the provision in recusing themselves, effectively answering any claim that there is widespread "self-censorship" at work. And despite his claims of overbreadth, Councilman Carrigan testified that he had recused himself only once. J.A. 196.

As this Court's precedents consistently emphasize, because "[w]ords inevitably contain germs of uncertainty," *Broadrick*, 413 U.S. at 608, and "there are limitations in the English language with respect to being both specific and manageably brief," *U.S. Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578-579 (1973), it is wrong to "insist[] upon a degree of rigidity that is found in few legal arrangements." *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002). Indeed, the Court's cases dealing with regulation of official conflicts of interest make exactly this point: "disqualifying criteria 'cannot be defined with precision. Circumstances and relationships must be considered.'" *Caperton*, 129 S. Ct. at 2261 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

Vasquez's advertising firm, at a minimum made the relationship "substantially similar" to a "substantial and continuing business relationship" that triggers the recusal requirement under subsection 8(d).

Indeed, subsection 2(c)'s basic prohibition against wielding governmental authority where private commitments would materially affect a reasonable officer's independent judgment, even without subsection 8's additional elaboration on its meaning, is no more open-ended than many provisions that this Court has sustained against First Amendment challenge. See, *e.g.*, *Hicks*, 539 U.S. at 116 (upholding regulation requiring "a legitimate business or social purpose for being on the premises") (emphasis omitted); *Arnett* v. *Kennedy*, 416 U.S. 134, 158-159 (1974) (plurality opinion) ("such cause as will promote the efficiency of the service"); *Broadrick*, 413 U.S. at 606 ("tak[ing] part in the management or affairs of any political party or in any political campaign"). Nor is that standard less precise than many other laws—including criminal laws—that govern public officials' ethical obligations, including conflicts of interest in particular. *Arnett*, 416 U.S. at 161 ("[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation.") (plurality opinion); *id.* at 164 (Powell, J., concurring in part and concurring in the result) (agreeing statute was not unconstitutionally vague or overbroad).

But the Nevada legislature created clarity far exceeding the constitutional minimum by anchoring the recusal provision involving private interests to relationships "substantially similar" to the four familiar statutory categories explicitly set forth in the statute. See Nev. Rev. Stat. § 281A.420(8). And the Commission carefully heeded that requirement in this case. See Pet. App. 102a-106a. Indeed, courts troubled by broad or vague general terms often have eliminated constitutional concerns by imposing the

very limitation the Legislature codified here. See, *e.g.*, *Norfolk & Western Ry.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."). Moreover, the phrase "substantially similar" is a familiar statutory term that has frequently been used in other statutes without causing undue difficulty.[14] Nevada's recusal statute "may not satisfy those intent on finding fault at any cost," *Letter Carriers*, 413 U.S at 578-579, but the language is plainly clear enough.

Public officials in Nevada are required to familiarize themselves with the Ethics in Government Law at the outset of each term and certify that they have "read and understand[]" its standards. Nev. Rev. Stat. § 281A.500(1)(a), (2)-(3) (2009). A public officer looking for further guidance as to the reach of subsection (e) would not be confined to the statute's bare words. As respondent was aware, J.A. 222, the Ethics in Government Law provides that officials may seek confidential guidance from the Commission as to "the propriety of [their] * * * future conduct," Nev. Rev. Stat. § 281A.440(1) (2009), and about whether a particular relationship requires recusal. *Id.* § 281A.460 (2009). Because "the underlying justification for the overbreadth exception" is "the interest in preventing an invalid statute from inhibiting the speech of third parties," *Vincent*, 466 U.S. at 800, the ability of those

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[14] *E.g.*, 11 U.S.C. § 1122(a) (involving bankruptcy plans); 15 U.S.C. § 78*l*(g)(5) (securities); 30 U.S.C. § 921(c)(4) (miners' benefits).

"need[ing] further guidance * * * to seek advisory opinions for clarification * * * and thereby 'remove any doubt there may be as to the meaning of the law,'" typically disposes of "chilling" claims. *McConnell* v. *FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Letter Carriers*, 413 U.S. at 580). And the legislative history of the Law provides additional guidance about its application. As both the Commission and the trial court emphasized, the Legislature specifically discussed what relationships subsection 8(e) would cover during the debate that preceded the Law's enactment, and the discussion indicated that ordinary campaign work by another person would not trigger the recusal obligation, but that recusal *would* be in order "'where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship.'" Pet. App. 69a (quoting Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999)).

Finally, respondent's claim that the Commission "arbitrarily determines whether a public officer's relationships are 'substantially similar' to the other relationships listed in subsection 8," Pet. App. 15a, does not affect this analysis. Neither the court below nor respondent offered any evidence of discriminatory enforcement, and "speculation" is insufficient to establish overbreadth. *Ashcroft* v. *ACLU*, 535 U.S. 564, 584 n.16 (2002). As the district court noted, "the Legislature has given the Commission and public officers four very specific and concrete examples to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission." Pet. App. 77a. Officials dissatisfied with an advisory opinion are

entitled to petition for judicial review. Nev. Rev. Stat. § 281A.440(1)(b) (2009).

Nevada's Ethics in Government Law speaks in clear terms and offers agency and judicial guidance for individuals who seek advice on its operation. It therefore affects protected speech, if at all, only in a "tiny fraction" of cases and cannot be facially overbroad. *New York* v. *Ferber*, 458 U.S. 747, 771, 773 (1982). "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-616.

2. The Nevada Recusal Law Is Narrowly Tailored

The requirement of narrow tailoring is satisfied if a neutral regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests," and the "'regulation promotes a substantial government interest that would be achieved less effectively'" without it. *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). That requirement is amply satisfied here. Because "[t]he alternative regulatory method[] [the court below] hypothesized"—disclosure alone—would serve Nevada's interest "less well," the State need not adopt it. The supposed alternative "reflect[s] nothing more than a disagreement with" the Nevada legislature over "how much" corruption to target and "how that level of control is to be achieved." *Id.* at 800.

The assumption that disclosure alone would serve Nevada's interest is surely incorrect. The multiyear

tenure of many offices makes the distant prospect of standing for reelection an uncertain deterrent, particularly because some officials voluntarily forego reelection. Moreover, the constituents' decision to return a legislator to office is not the equivalent of an acquittal of betraying the public trust. Reelection could just as easily result from running against an unpopular or unknown opponent or from constituents' belief that seniority or ideology outweigh the conflict of interest. In some cases, as was maintained here, voters may agree with their representative's vote, whatever the reason for casting it. And more fundamentally, the interest in the integrity of the office does not belong solely to a representative's own constituents; it belongs to *all* the people of the State. Cf. Nev. Const. art 15, § 2 (prescribing oath to "support, protect and defend * * * the constitution and government of the State of Nevada, * * * [and] bear true faith, allegiance and loyalty to the same"); *id.* § 3 (qualifications for local offices). And even popular politicians are appropriately subject to investigation and prosecution for corruption. Significantly, the Constitution has never treated the ballot box as the sole means of keeping elected officials within ethical bounds. See, *e.g.*, U.S. Const. art. I, § 5 (providing for expulsion of legislators and punishment for "disorderly Behaviour"); U.S. Const. art. II, § 4 (providing for impeachment of civil officers).

Disclosure fails to fully advance Nevada's interest in preventing biased decisions. Disclosure brings potential personal interest to light but does nothing to stop lawmakers from misusing their state-granted powers to decide matters in which their judgment "would be materially affected by * * * [their]

commitment in a private capacity to the interests of others." Nev. Rev. Stat. § 281A.420(2)(c) (2007). Without a recusal obligation, the most brazen forms of self-dealing could persist. For instance, a council member could disclose that he was married to a permit applicant and then cast the deciding vote to issue the permit. Such open self-dealing strikes a harder blow to public confidence than hidden motives do, but disclosure targets only the latter. As a result, Nevada reasonably concluded that a "complete prohibition" on voting by officials with private commitments is necessary to advance its interest in ensuring that public offices are "held for the sole benefit of the people." Nev. Rev. Stat. § 281A.020(1) (2009). The statute is therefore not "substantially broader than necessary," *Ward*, 491 U.S. at 800.

Respondent's testimony suggests that he does not dispute the need for recusal statutes, but only disagrees with the Nevada Legislature's judgment that the statute should cover "substantially similar" private commitments in addition to the four enumerated categories. See J.A. 214 (stating that he would have felt a need to abstain "[i]f it would have been a relative" representing the Lazy 8 because "any reasonable person" would have thought that fact "would sway you"). The decision below may reflect similar disagreement. But such line-drawing decisions have long been a matter of "legislative discretion." *Tumey*, 273 U.S. at 523. And treating relationships that implicate the same governmental interests to the same degree as the four categories is a "virtue, not a vice," because it suggests an absence of "a discriminatory governmental motive." *Hill* v. *Colorado*, 530 U.S. 703, 731 (2000).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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FEBRUARY 2011

STATUTORY APPENDIX

Nev. Rev. Stat. 281A.420 (2007)

Requirements regarding disclosure of conflicts of interest and abstention from voting because of certain types of conflicts; effect of abstention on quorum and voting requirements; exceptions

1. Except as otherwise provided in subsection 2, 3 or 4, a public officer may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.

2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his

commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

3. In a county whose population is 400,000 or more, a member of a county or city planning commission shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His direct pecuniary interest; or

(c) His commitment to a member of his household or a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his direct pecuniary interest or his commitment described in paragraph (c) where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed is not greater than that

accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the direct pecuniary interest or commitment.

4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest,

without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public

officer reported pursuant to NRS 294A.120 or 294A.125 or any contributions to a legal defense fund that the public officer reported pursuant to NRS 294.286 of this act in a timely manner.

5. Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that he will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

6. After a member of the Legislature makes a disclosure pursuant to subsection 4, he may file with the Director of the Legislative Counsel Bureau a written statement of his disclosure. The written statement must designate the matter to which the disclosure applies. After a Legislator files a written statement pursuant to this subsection, he is not required to disclose orally his interest when the matter is further considered by the Legislature or any committee thereof. A written statement of disclosure is a public record and must be made available for inspection by the public during the regular office hours of the Legislative Counsel Bureau.

7. The provisions of this section do not, under any circumstances:

(a) Prohibit a member of the Legislative Branch from requesting or introducing a legislative measure; or

(b) Require a member of the Legislative Branch to take any particular action before or while requesting or introducing a legislative measure.

8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:

(a) Who is a member of his household;

(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs him or a member of his household;

(d) With whom he has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

Nev. Rev. Stat. § 281A.420 (2009)

Requirements regarding disclosure of conflicts of interest and abstention from voting because of certain types of conflicts; effect of abstention on quorum and voting requirements; exceptions

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,

without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the persons to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

2. The provisions of subsection 1 do not require a public officer to disclose:

(a) Any campaign contributions that the public officer reported in a timely manner pursuant to NRS 294A.120 or 294A.125; or

(b) Any contributions to a legal defense fund that the public officer reported in a timely manner pursuant to NRS 294A.286.

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of others.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of others, accruing to the other persons, is not greater than that accruing to any other member of the general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth

in subsection 1 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which he was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others.

5. Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that the public officer will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

6. The provisions of this section do not, under any circumstances:

(a) Prohibit a member of a local legislative body from requesting or introducing a legislative measure; or

(b) Require a member of a local legislative body to take any particular action before or while requesting or introducing a legislative measure.

7. The provisions of this section do not, under any circumstances, apply to State Legislators or allow the Commission to exercise jurisdiction or authority over State Legislators. The responsibility of a State Legislator to make disclosures concerning gifts, loans, interests or commitments and the responsibility of a State Legislator to abstain from voting upon or advocating the passage or failure of a matter are governed by the Standing Rules of the Legislative Department of State Government which are adopted, administered and enforced exclusively by the appropriate bodies of the Legislative Department of State Government pursuant to Section 6 of Article 4 of the Nevada Constitution.

8. As used in this section:

(a) "Commitment in a private capacity to the interests of others" means a commitment to a person:

(1) Who is a member of the public officer's or employee's household;

(2) Who is related to the public officer or employee by blood, adoption or marriage within the third degree of consanguinity or affinity;

(3) Who employs the public officer or employee or a member of the public officer's or employee's household;

(4) With whom the public officer or employee has a substantial and continuing business relationship; or

(5) Any other commitment or relationship that is substantially similar to a commitment or relationship described in subparagraphs (1) to (4), inclusive, of this paragraph.

(b) "Public officer" and "public employee" do not include a State Legislator.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
MAR 24 2011
OFFICE OF THE CLERK

No. 10-568

IN THE

Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Petitioner Nevada Commission on Ethics censured an elected member of a city council for voting on one of the most important and controversial questions before the council—a question that dominated the contemporaneous election. The Ethics Commission held that the councilmember was disqualified because a key campaign volunteer had lobbied the city council on the issue. The question presented is what level of First Amendment scrutiny applies to Nevada's unique disqualification provision.

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John F. Kennedy, *Profiles in Courage* (Commerative ed. 1991) 23, 24

Leslie W. Abramson, *Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55 (2000) 48

Lynne E. Ford, *Encyclopedia of Women and American Politics* (2008) 24

Thomas Jefferson, *Manual of Parliamentary Practice* (New York, Clark & Maynard ed. 1868) (1801) 32

12 Thomas Jefferson & Paul Leicester Ford, *The Works of Thomas Jefferson* (1905) 31

William N. Eskridge, Jr., et al., *Cases and Materials on Legislation, Statutes and the Creation of Public Policy* (4th ed. 2007) 46

INTRODUCTION[1]

Petitioner Nevada Commission on Ethics wants to take the politics out of democracy.

The Ethics Commission censured Respondent Michael Carrigan for a vote he cast as an elected member of the Sparks City Council. The vote was on *the* question that dominated the election: whether to authorize development of a new casino. Councilmember Carrigan had no financial interest in the project. But the development was to be in his ward, and he had aggressively intervened at its inception and persuaded the developer to transform the proposal into a mixed-use project that he believed would benefit his constituents.

Another local casino bent on defeating the new competitor instigated an ethics proceeding against Councilmember Carrigan. The Ethics Commission held that Councilmember Carrigan was disqualified from the crucial vote on the proposal he helped craft. The disqualification was over a political relationship: One of Councilmember Carrigan's key campaign volunteers had lobbied the council in support of the

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[1] This brief uses the following abbreviations: Ethics Commission's opening brief ("Pet'r"); Joint Appendix ("J.A."); Cert. Petition ("Pet'n"); Petition Appendix ("P.A."); Ethics Commission hearing transcript ("Tr."); Administrative Record on Appeal to the Nevada District Court, filed at docket entries 49 and 50 before the District Court ("R.O.A."); Councilmember Carrigan's Corrected Opening Brief in Petition for Judicial Review ("P.O.B."); his Opening Brief in the Nevada Supreme Court ("A.O.B."). Because two different versions of the Nevada Revised Statutes are cited, we specify the year for each Nevada provision cited. All other statutory citations are to the most recent current version of the relevant code.

development—albeit long after the legislator had staked out his supportive position. The volunteer had the honorific "campaign manager"—but "key campaign volunteer" is more apt: He simultaneously performed the same function for multiple other campaigns, while also holding down several day jobs. The Ethics Commission professed a concern about the corrupting influence of Councilmember Carrigan's political "loyalties." P.A. 112a.

The Ethics Commission calls this case "literally unprecedented," Pet'r 3, and, outside of Nevada, it is. No other state agency appears to have ever disqualified an elected official on the basis of a political relationship. Equally unique is the catch-all statutory provision that invited this result. Nevada's ethics law starts where all the standard ethics statutes start, clearly enumerating several categories of disqualifying relationships: An official must abstain if a vote implicates his own financial interests or those of a household member, a relative, an employer, or anyone else with whom the official has a substantial and continuing business relationship. Nev. Rev. Stat. § 281A.420(2), (8) (2007). But Nevada stands alone in supplementing those broad categories with a catch-all that disqualifies the official for any relationship that is "substantially similar" to the ones enumerated.

The Nevada Supreme Court correctly struck the catch-all disqualification provision as unconstitutional. That ruling should be upheld for two reasons.

First, the catch-all disqualification provision is unconstitutionally vague. Councilmember Carrigan voted only because the City Attorney, after a tho-

rough legal analysis, concluded that the provision did not cover his relationship with the volunteer. And the Ethics Commissioners, for their part, could not even agree on whether the relationship was "similar" to a disqualifying business relationship or a disqualifying family relationship.

Second, even if the provision were clear, the censure severely burdens First Amendment rights. As a general matter, as the Nevada Supreme Court understood, a legislator's vote is expressive in its own right. It is also the culmination of numerous forms of constitutionally protected political expression and association. But under the Ethics Commission's ruling, the provision burdens far more than the expressive and associational aspects of the legislative vote. The Ethics Commission puts every candidate and key campaign volunteer to an untenable—and unconstitutional—choice: They both have a First Amendment right to associate to advance the candidate's election. But if they do, the volunteer must be prepared to check his right to petition the government at the campaign door. And the candidate must be prepared to miss critical votes on any issue that may turn out to be of interest to the volunteer.

This Court should affirm.

STATEMENT OF FACTS

Mr. Carrigan Launches a Grass Roots Campaign and Wins

Michael Carrigan is the type of local politician the country needs. He served as a naval aviator for 24 years, attaining the rank of Commander. J.A. 198. Upon retirement from the Navy, he became a jour-

nalist and then an instructor of media writing and ethics at the University of Nevada. J.A. 198–99.

Over the years, he found himself increasingly vexed by his local government's decisions. J.A. 199. In 1999, the City Councilwoman from his ward declined to run for reelection. *Id.* Carrigan mentioned to his wife that he hoped that the replacement council member would at least "know what's going on" in the city. *Id.* His wife replied that "if you think you can do a better job, why don't you try." *Id.*; *see also* J.A. 164. So, merely two weeks before the filing deadline, he threw his hat into the ring. J.A. 199. A political novice, Carrigan was the dark horse in a field with six other candidates. J.A. 164.

Carrigan overcame all the odds by running the 1999 campaign as a "grass roots" effort on a shoestring budget. Tr. 126. He won by 41 votes. J.A. 168. His constituents have since reelected him three times—in 2003, 2006, and 2010—by wide margins. J.A. 168–69, 173–74. He is about to celebrate his twelfth anniversary representing his ward.

Carlos Vasquez Volunteers on the Campaign

Obviously, no single factor—and no one person—can be credited with Councilmember Carrigan's political success. But some of the credit goes to a key campaign volunteer named Carlos Vasquez. J.A. 164.

Vasquez is a local businessman with interests in multiple ventures. He worked as a public relations consultant on dozens of local development projects. Tr. 118. He also owned an advertising agency, a

printing company, an internet firm, and even a gym. J.A. 232–33.

On the side, Vasquez frequently worked on local elections. J.A. 162, 231–32. Vasquez had previously offered to help Carrigan if he ever decided to run. J.A. 162. So it was only natural that Carrigan enlisted Vasquez's help when he decided to run. J.A. 162–64. Vasquez volunteered on that campaign and the next two campaigns as well. J.A. 163, 168, 172.

Councilmember Carrigan called Carlos Vasquez his "campaign manager." J.A. 163. But in tiny Sparks, Nevada (pop. 87,000, J.A. 223–24), campaigns are brief affairs. J.A. 168, 171–72. They run on shoestring budgets with a handful of volunteers—mostly family and close friends—that can fit around a card table. Tr. 125–26. Vasquez's campaign activities were extracurricular, performed in addition to his multiple day jobs. J.A. 232–33. At the time relevant to this case, he was working for several other political candidates. Tr. 128–29, 151. His title meant little more than that Vasquez offered Councilmember Carrigan advice on political strategy and help in soliciting campaign contributions. J.A. 164, 170. Vasquez has "managed" 92 campaigns in his career, serving 50 to 60 different candidates between 1999 (when Carrigan first ran) and 2006 (when the vote in this case was held). J.A. 231–32; Tr. 151. Sometimes he was paid—usually not. J.A. 232.

Councilmember Carrigan did not pay Vasquez. Pet'r 6, 8. Although Nevada does not impose any disclosure requirement on volunteer work, *see* Nev. Rev. Stat. § 294A.007(a) (2009) (excluding volunteer services from definition of "contribution"), Council-

member Carrigan disclosed Vasquez's volunteer work as an "in-kind" contribution for each of his elections to ensure his campaign was completely "above board." J.A. 175–76. Vasquez also acted as a middleman between the campaign and various vendors without taking a cut, J.A. 175, 242, and did so "at cost," P.A. 44a. Thus, as the Ethics Commission found, "Vasquez and his companies did not make any profit from these services." *Id.*; *see* P.A. 105a.

Vasquez volunteered because he "believed in Mr. Carrigan," J.A. 231, and was sure he would always "do the right thing, no matter what it costs," Tr. 151. Working together over several campaigns, Councilmember Carrigan and Vasquez naturally considered each other as friends. J.A. 168, 171, 231. But their social interactions in non-election years were limited to the occasional dinner and political discussion. J.A. 171, 204–05. Their professional association never extended beyond their campaign relationship. J.A. 189, 205–06.

The Lazy 8 Dominates the Third Campaign

A single issue dominated the election of 2006: the Lazy 8. J.A. 173–74.

The Lazy 8 was a casino project. Back in early 2005—a year and a half before the City Council vote in question—the Red Hawk Land Company ("Red Hawk") submitted an application to the City of Sparks Planning Department. P.A. 3a. The application sought an amendment to one of the City's planned development handbooks that would allow Red Hawk to construct a casino in Councilmember Carrigan's ward. J.A. 20. Any such project would also eventually require City Council approval, which

the Council could grant or withhold for any or no reason. City of Sparks Municipal Code § 20.18.060.

Councilmember Carrigan worried about how his constituents would react to a casino in their backyards. J.A. 191–92. Under Nevada law, it was typically impermissible to build a stand-alone casino. *See* Nev. Rev. Stat. §§ 463.01865, .1605 (2009). Casino projects were usually conditioned upon the developer's willingness to build other facilities, including a sizeable hotel. *Id.* But Red Hawk had a grandfathered license that would have allowed it to build a stand-alone casino. J.A. 191–92; Tr. 148. Councilmember Carrigan believed that such a project would be unpopular with his constituents. J.A. 191–92, 216–17, 235. So he "took it upon [himself]" to take a stand with Red Hawk's owner, a prominent businessman named Harvey Whittemore. J.A. 191–92. "Mr. Carrigan was very clear [the Lazy 8] initial design of this project in his opinion was inappropriate for the area." J.A. 235. He predicted that a stand-alone casino would never pass. J.A. 191–92. So he insisted that the developer include a hotel, retail area, and other amenities, *id.*, signaling to the developer and the public that he would support the project with those adjustments.

Councilmember Carrigan's interventions were transformational. He persuaded the developer to drop plans for an 18,000-square-foot stand-alone casino in favor of an entertainment area that was more than 15 times the size. J.A. 216–17. The new 300,000 square-foot proposal included a hotel, a 14-screen movie theater, five restaurants, and a facility to be used as either a police station or a fire station. *Id.* Councilmember Carrigan also persuaded Red

Hawk to donate $300,000 for affordable housing. J.A. 217.

Beyond that, Councilmember Carrigan pored over the plans and negotiated numerous design details. Through his persistence, the developer agreed to redesign the development so that families could reach the restaurants, theater, and other amenities without walking through the casino. J.A. 216–17. He also successfully urged Red Hawk to make concessions on all sorts of design details, from the height of buildings, to lighting, to traffic flow, to features that would better meld with the surrounding neighborhood. *Id.*; Tr. 120–22.

Councilmember Carrigan obviously had a clear sense of what was right for his ward. But he was not acting only on instinct. The Lazy 8 attracted a media maelstrom, which necessarily precipitated a lot of interest from constituents. J.A. 192–93. In the early phases of the negotiations, Councilmember Carrigan drew reactions and ideas from numerous communications with his constituents. *Id.* But as the approval process wore on, he had a much more direct way of gauging his constituents' wishes: The campaign season was under way. And in the months leading up to the primary election in August 2006, Councilmember Carrigan knocked on 2500 doors and asked his constituents face to face what they thought about his plan for the Lazy 8. J.A. 173. These conversations convinced him that at least 70% of his constituents supported his vision of the project. J.A. 193.

Even so, the project had its share of vocal detractors. Four challengers rose up to try to beat Coun-

cilmember Carrigan. R.O.A. 501. One especially ardent challenger was Jim de Prosse. John Ascuaga's Nugget ("the Nugget"), a competing casino, handpicked, recruited, and funded de Prosse to run against Councilmember Carrigan in the hopes of defeating the Lazy 8. J.A. 173. De Prosse turned the election into a single-issue referendum on the Lazy 8. J.A. 173–74.

The primary was on August 15, 2006. R.O.A. 501. The top two vote-getters were Councilmember Carrigan (54%) and Jim de Prosse (22%). *Id.* That meant that they would face each other in the general election. De Prosse persisted in focusing the general election debate entirely on the Lazy 8. J.A. 173–74.

The Lazy 8 Hires Vasquez as a Consultant

At some point in the approval process, Red Hawk and the developer hired Vasquez, the perennial campaign volunteer, as a public relations consultant. J.A. 192. Both the developer and Red Hawk's parent company had already retained Vasquez on numerous past projects. Tr. 106–07.

Vasquez's assignment was to "manage the misinformation" surrounding the project, handle media requests, and help Red Hawk understand the City Council's demands. Tr. 107, 140–41. In this regard, Vasquez met individually with the Mayor and each of the City Council members, including Councilmember Carrigan, to ascertain what it would take to get the project approved. J.A. 234; Tr. 138.

The record does not reflect exactly when the Lazy 8 proponents engaged Vasquez, but it was long after Councilmember Carrigan had intervened in the Lazy

8 negotiations, J.A. 193, 207, and after he had decided to support the project, as modified by the improvements he negotiated, J.A. 193.

The City Attorney Advises Councilmember Carrigan That He May Vote on the Lazy 8

The public debate was to come to a head at a City Council meeting on August 23, 2006—just a week after the primary. Before the meeting, Councilmember Carrigan sought legal advice from the Sparks City Attorney as to whether his relationship with Vasquez presented any conflict of interest under Nevada's ethics laws. Contrary to the Ethics Commission's assertion that "Carrigan was aware that his relationship with Vasquez was potentially disqualifying," Pet'r 7, Councilmember Carrigan was confident that the relationship was *not* disqualifying, J.A. 196. Vasquez had assured Councilmember Carrigan that the Council's decision on the Lazy 8 would not affect him personally, regardless of which way the vote went. J.A. 193–94. But Councilmember Carrigan nevertheless sought the opinion because he "wanted to make sure that everything was out in the open" and "did not want somebody to think that [he] was voting in a certain way because Carlos [was] a friend." J.A. 196.

The week before the City Council meeting, the City Attorney issued a memorandum to the Mayor, the City Council, and the City Manager, advising them that the "only type of bias which may lead to disqualification of a public official must be grounded in facts demonstrating that the public official stands to reap either financial or personal gain or loss as a result of official action." J.A. 91–92. The City Attor-

ney wrote that "simple personal connections and friendships" did not constitute a disqualifying possibility of "financial or personal gain or loss." J.A. 87. Had the City Attorney advised Councilmember Carrigan to abstain from voting on Lazy 8's application, he would have done so. J.A. 212. But because his financial stake was no more or less than anyone else's in the community, Councilmember Carrigan believed that he was not required to abstain. J.A. 197. Councilmember Carrigan knew that he could seek an advisory opinion from the Ethics Commission itself. J.A. 222. He did not do so, however, because he believed that the City Attorney had contacted the Ethics Commission and incorporated its advice into his recommendation. J.A. 222–23.

Councilmember Carrigan Loses the Lazy 8 Vote But Wins the Election

Following the City Attorney's advice, at the start of the August 23 City Council meeting, Councilmember Carrigan disclosed that Vasquez was his "personal friend" and "campaign manager." J.A. 82.

The meeting on the Lazy 8 became a "contentious and fairly dramatic" debate. J.A. 178. Challenger de Prosse was especially vocal. He declared that 70% of the voters in the ward opposed the Lazy 8. J.A. 173.

In the end, Councilmember Carrigan voted to approve the Lazy 8 proposal to which he had devoted so much time and which he had a major role in recrafting to benefit his constituents. J.A. 79–80. His position lost 3-2. J.A. 80.

Immediately upon losing the City Council vote, Red Hawk sued the City, claiming that an earlier development agreement with the City gave it the right to construct the Lazy 8. A.O.B. 3. The City settled the suit on September 1, 2006, by approving the Lazy 8 development as proposed at the August City Council meeting, including the improvements Councilmember Carrigan fought to impose. *Id.*; *see also* R.O.A. 528, 534. The Council publicly voted to approve the settlement on September 20, 2006. A.O.B. 4.

The general election was a little over a month away. De Prosse turned the election into a referendum on Councilmember Carrigan's Lazy 8 vote. J.A. 173–74. Councilmember Carrigan defeated de Prosse by a landslide, 62% to 38%. *Id.*

The Lazy 8's Opponents File Ethics Complaints

The Lazy 8's opponents were not prepared to concede defeat. The Nugget recruited citizens to file ethics complaints against Councilmember Carrigan. R.O.A. 449. Two weeks after Red Hawk's lawsuit was settled, several of these recruits submitted identical ethics complaints to the Ethics Commission. A.O.B. 4; *see also* J.A. 159. They asserted that Councilmember Carrigan was disqualified from voting on the Lazy 8 because his relationship with Vasquez gave the volunteer "undue influence" over his vote. A.O.B. 3.

Nevada law requires a public official's disqualification whenever the matter involves someone to whom the official has a "commitment in a private capacity." Nev. Rev. Stat § 281A.420(2)(c) (2007). Consistent with many states' ethics laws, the statute

defines such a disqualifying commitment to include relationships with (i) household members; (ii) family members; (iii) employers; and (iv) people with whom the official has a substantial and continuing business relationship. *Id.* § 281A.420(8)(a)–(d). But Nevada adds a unique catch-all provision extending the disqualification to any relationship that is "substantially similar" to any of the enumerated ones. *Id.* § 281A.420(8)(e).

When an official is burdened by any of the described relationships, the "officer shall not vote upon" the matter, and may not even "advocate the passage or failure of" the measure. *Id.* § 281A.420(2). So if this provision applied to Councilmember Carrigan's relationship with Vasquez, the law muzzled him from advocating and voting on the proposal that he had spent over a year crafting—just because an interested party hired Vasquez long after Councilmember Carrigan had taken a public stand on the project.

The Ethics Commissioners struggled with how the disqualification provision applied to this case. Most were clear that Councilmember Carrigan's relationship with Vasquez was not among the enumerated relationships. But they could not agree on which of the forbidden relationships most resembled their relationship. *See* J.A. 247–52. Two thought the relationship actually was, or was similar to, "a substantial and continuing business relationship," J.A. 247, 250, one thought it was more like a close family relationship, J.A. 248, and one thought it was both, J.A. 251–52.

Ultimately, the Ethics Commission declined to pick one. It concluded vaguely that the "sum total of their commitment and relationship equates to a 'substantially similar' relationship to those enumerated" in the statute—*all* of them. P.A. 105a. The Ethics Commission was concerned that as Councilmember Carrigan's "campaign manager and political advisor," "Mr. Vasquez ... was instrumental in the success of all three of Councilman Carrigan's elections." P.A. 104a. Thus, the Ethics Commission concluded, Councilmember Carrigan must have had "strong loyalties" to his "close friend, confidant and campaign manager." P.A. 112a.

The Ethics Commission found, however, that Councilmember Carrigan's decision to participate in the Lazy 8 vote was not a "willful" violation of the ethics code, because he had relied on the advice of the City Attorney and "did not consider his relationship with Mr. Vasquez a relationship that falls under the statute." J.A. 264–66; *see also* P.A. 112a. Thus, the Ethics Commission declined to impose any monetary penalty, but did "censure" Councilmember Carrigan for the violation. P.A. 1a; *see also* P.A. 112a.

Councilmember Carrigan did not take the censure lying down. He had always adhered to the Navy's honor code, J.A. 194–95, and to the ethics he taught at the University, J.A. 198–99. He had always exceeded legal requirements, as he did with reporting volunteers as in-kind contributors. J.A. 169, 175, 194–95. This was the sole blemish in an otherwise sterling career. He took the Ethics Commission to court.

The State District Court Affirms the Censure

In the state district court, Councilmember Carrigan challenged the decision on factual and legal grounds, including a First Amendment challenge. The Nevada District Court concluded that "Vasquez's role as Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend" gave him "a substantial and continuing political, professional, and personal relationship" with Councilmember Carrigan that met the statutory definition. P.A. 62a. The district court assumed that the First Amendment protected voting by elected officials, but held that "the *Pickering* balancing test ... is the proper standard of review." P.A. 60a. The court found that the statute survived that balancing test. P.A. 61–62a.

The Nevada Supreme Court Vacates the Censure

In a 5-1 decision, the Nevada Supreme Court reversed. It held that the catch-all disqualification provision violated the First Amendment. The court found that "voting [on legislation] is a core legislative function" and that "voting by an elected public officer on public issues is protected speech under the First Amendment." P.A. 11a. The court then held that strict scrutiny was the appropriate standard. P.A. 13a.

In so ruling, the Court emphasized "that promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest." P.A. 16a; *see also* P.A. 8a n.5. But the catch-all provision failed to "provide sufficient limitations and explanations con-

cerning when recusal is required to avoid overreaching in unnecessary situations." P.A. 8a n.5. Consequently, the "statute's reach [was] substantially overbroad in its regulation of protected political speech," P.A. 16–17a, and not sufficiently "narrowly tailored" to further the asserted interest, P.A. 16a.

SUMMARY OF ARGUMENT

1. As the Ethics Commission acknowledges, whether the Nevada Supreme Court erred in applying strict scrutiny to the State's unique disqualification rule depends on how much First Amendment activity that particular provision burdens. No state other than Nevada includes a catch-all provision in its disqualification rules. And no other state appears to have invoked its disqualification rules based on a political relationship. Because Nevada's catch-all disqualification provision is unique and unprecedented, its demise will be no "calamit[y]." Pet'r 3.

2. Nevada's unique catch-all disqualification provision implicates two sets of First Amendment rights. First, a legislator's vote is protected expression because it states a policy position and associates the legislator with allies. The message conveyed by a vote is the culmination of a long series of political expressions and associations that this Court has held are protected by the First Amendment. That the vote has a "legal effect" does not "somehow deprive that activity of its expressive component." *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2818 (2010).

Second, the provision burdens the rights of a campaign volunteer and a political candidate to associate with one another. Councilmember Carrigan and his key campaign volunteer were engaged in

core political activity that harkens back to the foundation of our democracy and that is, even today, the very essence of democratic participation. Yet the Ethics Commission disqualified Councilmember Carrigan from the critical Lazy 8 vote because of his "strong loyalties" to his campaign volunteer. The sorts of political "loyalties" that the Ethics Commission targets threaten core associational rights.

3. Because the catch-all disqualification provision severely burdens a constellation of expressive and associational rights, it is subject to strict scrutiny. It establishes a dynamic where volunteers have to check their right to petition government at the campaign door and candidates are forced to choose between enlisting volunteers who are politically active or safeguarding their duty to vote on issues of public importance. But standard statutes disqualifying a legislator for voting on a bill that advances her own pecuniary interests (or those of her husband, daughter, employer, or business partner) should be subject to intermediate scrutiny. That is the level of scrutiny that applies to a variety of other expressive acts. Such provisions would easily survive any appropriate level of scrutiny.

4. Nevada's catch-all disqualification provision fails any appropriate level of scrutiny. To begin with, it is hopelessly vague. Even the most intelligent layperson reading the statutory language should not be expected to know that this relationship is "substantially similar" to a business relationship, where a City Attorney, in an extensive analysis, concludes the opposite. And the layperson should not be expected to do any better than the Ethics Commissioners, whose views were so disparate that they

could not agree on which enumerated relationship the Vasquez relationship was most like—and so declined to specify. The vague provision impermissibly allowed the Nugget to co-opt an ethics agency to override losses fairly sustained in the political process.

Even if the Legislature had drafted a clear provision applying to campaign managers, it would be unconstitutional. The state has no legitimate interest, much less a compelling interest, in prohibiting a vote based on political loyalty. This case is not about Councilmember Carrigan's personal economic interests, but his *political* interests. The Ethics Commission aspires to a sterile political utopia in which elected officials make all their political decisions free from these sorts of political "debts." But such a utopia (if that is what is) is unattainable, foreign to our democracy, and unconstitutional. Responsiveness and accountability are the key features that distinguish restrictions on elected *representatives* from restrictions on elected *judges*.

Finally, the disqualification provision is unconstitutionally underinclusive and overbroad and it burdens more speech than is necessary to achieve the purported objective.

ARGUMENT

I. NEVADA'S CATCH-ALL DISQUALIFICATION PROVISION IS UNIQUE AND UNPRECEDENTED

The Ethics Commission originally posed the question "whether the First Amendment subjects state restrictions on voting by elected officials to (i) strict

scrutiny ... , (ii) the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), for government-employee speech, ... or (iii) rational-basis review." Pet'n i. It is impossible to answer that question in the abstract, just as it would be impossible to answer definitively whether the First Amendment subjects election laws to strict scrutiny. As the Ethics Commission acknowledges, the answer depends on the nature of the restriction—and specifically, on how much First Amendment activity the provision burdens. Pet'r 36; *see Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999). That is presumably why the Ethics Commission has shifted to the more case-specific, and answerable, question: "[w]hether the Nevada Supreme Court erred by applying strict scrutiny to *the State's ... recusal rule*." Pet'r i (emphasis added).

When the focus is properly on Nevada's catch-all disqualification provision, it becomes evident that the Ethics Commission's dominant theme is markedly off target. "[L]iterally unprecedented," gasps the Ethics Commission. Pet'r 3. An affirmance would be "calamitous," *id.*, it proclaims, jeopardizing most any law that requires a legislator (or any other government official) to disqualify himself on any basis, *see* Pet'r, 16–17, 44–46.

The panic is overwrought. Nevada's provision is unique—literally unprecedented—and it can be struck on either of the two bases that make it unique.

First, the Ethics Commission correctly points out that "[v]irtually every State has enacted conflict-of-interest regulations for legislators"—and that they

tend to "encompass[] officials' relatives and business associates." Pet'r 22. But it neglects to mention that Nevada is the only state that has engrafted a catch-all "substantially similar" provision (or anything similar to it) onto its disqualification rules.[2]

Second, so far as we can tell, no other state has *ever* disqualified an elected official from voting based on a political relationship of any sort. The Ethics Commission does not cite a single instance in which any state or local jurisdiction ever passed a law that explicitly targeted an elected official's relationship with campaign volunteers, or campaign managers, for disqualification. Nor has the Ethics Commission cited any other instance where an ethics authority has *interpreted* a disqualification provision to reach such a relationship. We have found only one that even comes close—and it was not even an ethics law: It was a state statute prohibiting lobbyists from vo-

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[2] Many states require disqualification when the matter implicates the financial interests of the legislator, or the interests of the legislator's family members, business associates, or employer. *See, e.g.*, N.J Stat. Ann. § 40A.9-22.5(d); Mo. Rev Stat § 105 452(4). Notably, all of the state conflict of interest provisions cited by the Ethics Commission are of this type, *see* Pet'r 22–23 n 7, as is the model code provision suggested by a leading scholar in the field, *see* Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, in *Government Ethics and Law Enforcement: Toward Global Guidelines* 97, 119 (Yassin El-Ayouty et al., eds., 2000). A few other states generally prohibit a legislator from participating in any matter in which the legislator has a "personal," "private," or "substantial" interest without defining what constitutes such a disqualifying interest *See e.g.*, Colo. Rev. Stat. § 24-18-109(3)(a). Some states appear to require only disclosure instead of disqualification. *See, e.g.*, Idaho Code Ann. § 59-704.

lunteering their services to candidates for state office. *See Barker v. Wis. Ethics Bd.*, 815 F. Supp. 1216, 1218 (W.D. Wis. 1993) (discussing Wis. Stat. § 13.625(1)(b)). It was struck on First Amendment grounds. *Id.* at 1221–22.

Thus, striking Nevada's catch-all disqualification provision based on its unconventional features would have little effect outside Nevada. The Ethics Commission's parade of horribles emerges not from the Nevada Supreme Court's *holding* that the catch-all provision is unconstitutional, but from some of that court's broader language suggesting a rule that would lead to strict scrutiny for reviewing all disqualification statutes. Pet'r 44; *see, e.g.*, P.A. 13a. But this Court has no obligation to crib from the Nevada Supreme Court's opinion. Prudence would dictate that this Court address only the statutory provision before it. Indeed, even the Nevada Supreme Court emphasized that it was addressing "only" the catch-all provision, leaving intact "the remainder of the statute, including all the enumerated bases for disqualification." P.A. 17a n.10.

Which brings us to another threshold matter: whether to treat this challenge as facial or as-applied. The majority and the dissent below disagreed on the answer. *Compare* P.A. 13a *with* P.A. 31a n.5. Councilmember Carrigan raised both. A.O.B. 5, 9–10, 15. This is an as-applied challenge because Carrigan's "claim and the relief that would follow" is limited to him. *Doe*, 130 S. Ct. at 2817. He seeks only to "set aside the August 29, 2007 decision of the Nevada Commission on Ethics and the related published opinion," P.O.B. 29, not an injunction against enforcement of the statute against others.

That said, the labels do not matter, because, as we shall demonstrate, Councilmember Carrigan should prevail regardless of the proper characterization.

II. NEVADA'S UNIQUE DISQUALIFICATION PROVISION BURDENS SEVERAL FIRST AMENDMENT RIGHTS

Before the Nevada Supreme Court, Councilmember Carrigan argued that the catch-all disqualification provision burdens constitutional rights in two distinct ways. He argued generally that most any disqualification statute burdens the expressive and associational aspects of a legislator's right to vote. A.O.B. at 16–19. And, more specific to this unique provision, he argued that "Mr. Vasquez' participation in Councilman Carrigan's campaigns amounts to political volunteerism that is protected by the United States Constitution" on both sides of the relationship, A.O.B. 9—both for "Mr. Vasquez' right to volunteer, and Councilman Carrigan's right to accept" his support, A.O.B. 18.

The Nevada Supreme Court focused on the more general First Amendment implications of restricting a legislator's vote. This Court cannot, however, adequately determine the level of scrutiny without assessing the full range of First Amendment rights burdened by the provision under review precisely because, as the parties agree, the level of scrutiny depends on the precise manner in which a provision burdens First Amendment rights. *See supra* at 18–19. We, therefore, address the two different sets of rights in turn, beginning with the right the court below addressed.

A. The Provision Burdens A Legislator's First Amendment Right To Express Political Views And To Associate With Political Allies

There can be no doubt that Councilmember Carrigan was expressing something when he proclaimed "Aye" on the Lazy 8. The vote was the ultimate—and definitive—expression of his controversial viewpoint that the development, as modified by his advocacy, was right for his ward. In so voting, he gave voice to the 2500 constituents he consulted during the campaign, J.A. 173, and particularly the 70% who supported the project, J.A. 193. "[V]otes of the individual Council members are intended to express their positions on issues of public policy, and are understood to do so by the Council members' constituents and other observers." *Clarke v. United States*, 886 F.2d 404, 412 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc). "There can be no more definite expression of opinion than by voting on a controversial public issue." *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989).

Our history is rich with tales of legislators using their votes to express deeply held and highly unpopular views, often at great personal or political peril. John Quincy Adams was communicating a message when he broke with his beloved Federalist Party—knowing it would cost him his Senate seat—to vote for the Embargo Act of 1807 because, he believed, that was what the "public good" demanded. John F. Kennedy, *Profiles in Courage* 48 (Commemorative ed. 1991). Sam Houston was sounding a clarion call for equality when he joined with only one other

Southern Senator to vote against repeal of the Missouri Compromise—"the most unpopular vote I ever gave [but] the wisest and most patriotic," he explained. *Id.* at 109. Representative Jeannette Rankin (R-Mont.) was expressing her conscience when she cast the lone vote in Congress against entering World War II, declaring, "As a woman, I can't go to war and I refuse to send anyone else." Lynne E. Ford, *Encyclopedia of Women and American Politics* 276 (2008). The list can go on for pages: Senator Edmund Ross (R-Kan.). Representative Meyer London (Socialist-NY). Senator Clair Engle (D-Cal.). Senators Wayne Morse (D-Ore.) and Ernest Gruening (D-Alaska). The trio of Senate protagonists of the "Palm Sunday Compromise." All the talk these figures might have uttered—about the evils of British imperialism, slavery, war, impeachment, the Sedition Act, racial discrimination, and the like—was cheap compared to the message packed by their votes.

Councilmember Carrigan has no delusions of being a modern day Adams and the Lazy 8 was not World War II. But in that particular community at that particular moment, the Lazy 8 was *the* issue and he was *the* political protagonist behind it.

The vote, moreover—like each of the foregoing votes—was the culmination of a lengthy political process: It began with the kitchen table conversation that kick-started Councilmember Carrigan's campaign. It escalated with his door-to-door efforts to gauge his constituents' will and his cajoling the developer to conform the development to his and his constituents' interests. It reached a fevered pitch with Councilmember Carrigan's election campaign,

which became a public referendum on the development, and the swirl of public advocacy by him and others debating the project. The electorate spoke resoundingly on the issue by choosing Councilmember Carrigan and his vision of the Lazy 8 over his single-issue opponent. All this came to a head when Councilmember Carrigan joined allies in the City Council to vote in support. This Court has imbued every step along this path with the highest level of First Amendment protection. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675–76 (1998) (campaign debates); *Brown v. Hartlage*, 456 U.S. 45, 58 (1982) (campaign promises); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (public advocacy); *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (campaign spending and fundraising). It seems incongruous to assert that the very notion of First Amendment protection for the culminating moment of all these protected activities is "alien to the American constitutional tradition." Pet'r 14.

The first circuit to address the issue found the point so self-evident that it thought it "unassailable." *Miller*, 878 F.2d at 532. "[W]e have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes with the freedom of speech guarantee of the first amendment," the court held, "especially ... when the agency members are elected officials." *Id.* Other circuits have agreed. *See Clarke*, 886 F.2d at 412; *Camacho v. Brandon*, 317 F.3d 153, 160 (2d Cir. 2003) ("Voting on public policy matters coming before a legislative body is an exercise of expression long protected by the First Amendment.").

This Court, too, reached the same conclusion just last Term in the analogous context of a referendum where each citizen is "acting as a legislator." *Doe*, 130 S. Ct. at 2833 (Scalia, J., concurring). The threshold question there was whether there was any First Amendment protection in a citizen-legislator's decision to sign a petition to put a piece of legislation up for public vote. *Id.* at 2817. This Court, too, had no difficulty finding that a citizen-legislator "expresses a view on a political matter when he signs a petition under [a state's] referendum procedure." *Id.*

The Ethics Commission concedes that a legislative vote "'arguably contains a communicative element.'" Pet'r 25 (quoting *Spallone v. United States*, 493 U.S. 265, 303 n.12 (1990) (Brennan, J., dissenting)). An act that is "sufficiently imbued with elements of communication" necessarily has *some* First Amendment protection. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation omitted); *see also United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). Nevertheless, the Ethics Commission argues that "[l]egislators do not have an individual free speech right to vote," mainly because "'the act is quintessentially one of governance'" rather than speech. Pet'r 24–25 (quoting *Spallone*, 493 U.S. at 303 n.12 (Brennan, J., dissenting)).

But *Doe* rejects that very argument. 130 S. Ct. at 2818. This Court acknowledged that the citizen-legislator's signature on the referendum petition is a "legally operative legislative act," just like an elected legislator's vote. *Id.* But that did not change the First Amendment analysis: "[W]e do not see how

adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment." *Id.* To the contrary, the act "remains expressive even when it has legal effect in the electoral process." *Id.*

The Ethics Commission also protests that a vote cannot be expressive because it is "no simple matter" to discern the precise message conveyed by a legislator's vote. Pet'r 27. But *Doe* disposed of that argument as well. It recognized that it is no simple matter to discern the meaning in a citizen-legislator's "vote" to put a statute on the ballot. Sometimes an "individual's signature will express the view that the law subject to the petition should be overturned," but other times the signature "expresses the political view that the question should be considered 'by the whole electorate.'" 130 S. Ct. at 2817. "In either case," the Court explained, "the expression of a political view implicates a First Amendment right." *Id.*

Next, the Ethics Commission protests that First Amendment protection of Councilmember Carrigan's vote "is inconsistent with the broad discretion this Court traditionally has afforded each State to 'structure its political system.'" Pet'r 25 (quoting *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 13–14 (1982)). Once again, *Doe* is eloquent on this point: The "State, having 'cho[sen] to tap the energy and legitimizing power of the democratic process, ... must accord the participants in that process the First Amendment rights that attach to their roles." *Doe*, 130 S. Ct. at 2817 (quoting *Republican Party of*

Minn. v. White, 536 U.S. 765, 788 (2002) (alteration by *Doe*)). Moreover, there is no inconsistency between the position that a vote has *some* element of expression and the caveat that the First Amendment permits some state regulation. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (upholding ban on fusion candidacies because the "burdens [the state] imposes on the party's First ... Amendment associational rights—though not trivial—are not severe").

Finally, the Ethics Commission cites several standing cases for the proposition that a legislator does not have a "personal" or "private" right to cast a legislative vote. Pet'r 24–25. But if anything, the standing cases show the opposite. On the one hand, legislators *do* have standing to sue for "something to which they *personally* are entitled"—such as their "seats as Members of Congress after the constituents had elected *them*." *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (original emphasis). On the other hand, they do not have standing to sue for an "institutional injury" that "damages" all legislators "equally" so that no one legislator is "singled out for specially unfavorable treatment." *Id.*; *see also, e.g., Coleman v. Miller*, 307 U.S. 433, 464 (1939) (Frankfurter, J., concurring) (claims did not "relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonalty"). The Ethics Commission simply cited cases in the latter category, while ignoring cases in the former. Under these cases, Councilmember Carrigan *does* have standing to sue, for he, alone, was disqualified from voting, and his interest in expressing his views is personal to him. *Cf. Bond v. Floyd*, 385 U.S.

116, 136–37 (1966) (holding elected state legislator had First Amendment right to be seated). If the Ethics Commission seriously believed that Councilman Carrigan did not have standing, would not have sought review from this Court.

In sum, there is no reason to except a legislator's vote from the types of political expression and association protected by the First Amendment.

B. The Disqualification Provision Burdens A Candidate's And A Campaign Volunteer's Right To Associate With One Another

Nevada's catch-all disqualification statute imposes a second, distinct set of First Amendment burdens that are not implicated by any other disqualification provision in the country. Although the disqualification falls directly on the legislator, the statute also burdens the relationship between the legislator/candidate and her campaign volunteers.

1. The disqualification was based on a political relationship

The Ethics Commission's opinion at points mentioned Councilmember Carrigan's "close personal friend[ship]" with Vasquez. *See* P.A. 105a, 112a. But the dominant factor in its opinion was their political relationship—and particularly the view that Vasquez was "instrumental in the success of all three of Councilman Carrigan's elections." P.A. 104a. As one Commissioner put it, "I don't think mere friendship requires disclosure," but "here ... [w]e have the close friendship and relationship of a campaign manager, of a political confidante and adviser as

well." J.A. 254. According to another Commissioner, it was "a dependent relationship ... that has a *feeling of debt* or I'm here because this person got me elected and has kept me elected." J.A. 250–51 (emphasis added); *see also* J.A. 252.

This was not a new theme for the Ethics Commission. In an opinion known as the "Terminal D Opinion," the Ethics Commission censured a legislator for voting on a matter involving two political supporters. *Gates v. Nev. Comm'n on Ethics*, No. A393960, slip op. at 2 (Clark Cnty. Nev. Dist. Ct. Sept. 9, 1999) (App'x 2–3a).[3] One had "served on [the legislator's] campaign for her County Commission seat." *Id.* The other was "a fundraiser who had organized hundreds of thousands of dollars to be contributed to Petitioner's campaign funds." App'x 3a. The Ethics Commission found that "a political alliance" is disqualifying if "both [parties] are dedicated to common causes, one of which is the furtherance of the [legislator's] political aspirations." *In re Gates*, Nev. Comm'n on Ethics Op. Nos. 97-54 et al. (Aug. 26, 1998), available at http://ethics.nv.gov (unpaginated document). Disqualification is also mandatory whenever a close relationship is "forged in the context of common political and philosophical beliefs

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[3] A state court overturned the Terminal D decision, on the ground that an earlier version of the disqualification provision (one without the enumerated relationships) was unconstitutionally vague. App'x 12–15a. But Terminal D remains very much alive, because the Ethics Commission has taken the position that the current catch-all provision was a codification of the opinion. J.A. 249–50. The state court decision is not available online or in any electronic database. For the Court's convenience, the case is reproduced in an appendix to this brief and cited as "App'x."

that both [parties] felt strongly enough about that they had become politically active on behalf of those causes." *Id.*; *see also* J.A. 106–07 (Nev. Attorney General Op. 98-27, discussing the Terminal D Opinion).

2. The disqualification provision burdens a protected relationship

Vasquez gave voice to a venerable tradition of political volunteerism when he testified: "I donated my time" to Councilmember Carrigan because, "[s]omebody comes along that I believe in ... and I think they can do the right things, it's not necessarily that they are going to be on the right place with all my stuff." Tr. 126. The Ethics Commission considers political relationships like the one Vasquez describes to be troubling. But the relationship harkens back to the foundation of our democracy and exemplifies, even today, the very essence of democratic participation.

James Madison "was Jefferson's campaign manager, long before the term was coined." Andrew Nurstein & Nancy Isenberg, *Madison and Jefferson* 319 (2010) ("To use modern parlance, ... Congressman Madison may be described as the first presidential campaign consultant."). And their "friendship" of "a half century" "united" them in "the same principles and pursuits of what [they] have deemed for the greatest good of our country." 12 Thomas Jefferson & Paul Leicester Ford, *The Works of Thomas Jefferson* 481 (1905). The Founders would have been horrified at the notion that Madison's support for a bill would have disqualified President Jefferson from

signing it into law because some commission thought their political "loyalties" corrupting. P.A. 112a.

Certainly, no condemnation of such relationships is to be found in Jefferson's *Manual*, which the Ethics Commission features so prominently. *See* Pet'r 15, 19–21, 28, 38. Jefferson declared (and we agree) no "man [may] be a judge in his own cause." Thomas Jefferson, *Manual of Parliamentary Practice* 44 (New York, Clark & Maynard 1868) (1801). But so far as we know, neither he nor any contemporary ever intimated that no man may be a judge in his political ally's cause, his volunteer's cause, or even his campaign manager's cause. And we have been unable to find any instance in our history in which a relationship forged in politics was ever viewed as disqualifying or otherwise sanctionable.

In targeting these sorts of "political alliances" and "loyalties," the Ethics Commission has taken aim at core First Amendment rights of political speech and association on both sides of the political relationship.

Burdening the campaign volunteer's rights. This Court long ago held that the First Amendment protects the right of activists like Vasquez "to associate actively through volunteering services" as a form of political association, *Buckley*, 424 U.S. at 28, and more specifically that "political campaigning and management" are "activities ... protected by the First Amendment," *Elrod v. Burns*, 427 U.S. 347, 370–71 (1976); *see NAACP v. Button*, 371 U.S. 415, 428–45 (1963) (holding that activists and their representatives both have First Amendment rights of association).

Moreover, like many political activists, Vasquez's activism does not hibernate between elections. He promotes candidates he believes in because he wants legislators who will implement policies he favors. So beyond the campaign, Vasquez exercises his right "to petition the Government for a redress of grievances." U.S. Const., amend. I. The First Amendment protects Vasquez's right to engage in these political activities as well. His mediating activities between the Lazy 8 and the City Council were quintessential examples of the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990). Vasquez's public relations activities, too, lay "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776.[4]

Under Nevada's regime, the price of exercising the associational right to volunteer for a campaign is to check one's right to petition government at the campaign door. Before volunteering on a campaign, a citizen with strong political convictions must make a calculation: "If I want this candidate to win *because of* his political convictions—i.e., because of how I expect him to vote—am I prepared to forego the

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[4] Vasquez did not lose his First Amendment protection because he was a hired advocate. *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 645 n.28 (1st Cir. 1995) (Lynch, J., dissenting). As this Court has recognized, "[s]ome of our most valued forms of fully protected speech are uttered for profit." *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989).

right to engage the entire legislature on a vote that is important to me?"

When the volunteer knows up front that a major vote is looming, the burden is direct and palpable. An executive director or senior official of any local organization will have to decide whether to help manage a candidate's campaign or lobby the legislative body on the important issue. The activist will be leery of joining the campaign, particularly if the legislature is closely divided on the issue—which is the only time the election effort really matters. The very act of volunteering on a candidate's campaign could yield a disqualification that defeats the volunteer's political agenda.

Even more chilling are circumstances in which the consequences of volunteering are unpredictable. A political activist might have numerous political passions. She has no idea which of them may arise in some upcoming multiyear legislative term. The only way to preserve her right to engage in future political advocacy on such an issue—known or unknown—is to sit out the election.

Burdening the candidate's associational rights. Councilmember Carrigan, for his part, has a correlative right to associate with the volunteers who believe in him—a right that is "deeply embedded in the American political process." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981). "[R]eliance on volunteers [is] absolutely essential and, in light of the enormous significance of citizen participation to the preservation and strength of the democratic ideal, absolutely desirable, indeed indispensable."

Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 627–28 (1976) (Brennan, J., concurring in part).

The candidate's right to associate with volunteers encompasses the right to choose the best person to fill each volunteer role that needs to be filled to win a campaign. *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (the First Amendment "protects [activists'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing"). The disqualification provision deprives the candidate of the latitude to choose the best advocates and strategists to advance his campaign. Candidates who take their public obligations seriously will be reluctant to enlist a campaign manager whose interests and activities might eventually come before the legislature.

The candidate is even more disadvantaged than the volunteer. At least the volunteer has some sense of the range of issues that interest her. But the candidate has no way of ensuring that a volunteer's activities will not end up interfering with legislative duties. The candidate might consider subjecting prospective campaign volunteers to extensive political questionnaires or seeking a no-lobbying pledge. But those are good ways to lose volunteers and terrible ways to guard against the dangers of disqualification. In any event, none of these measures will protect the candidate from the possibility that an ardent opponent in the Nugget's position might try to win a crucial legislative battle by throwing enough money at a former campaign manager like Vasquez so as to disqualify their legislative opponents.

In the end, the candidate will enlist only the volunteers who are least politically active, which almost by definition translates into volunteers who are least politically effective.

III. THE CATCH-ALL DISQUALIFICATION PROVISION IS SUBJECT TO STRICT SCRUTINY

The severe First Amendment burdens imposed by the specific catch-all disqualification provision are subject to strict scrutiny. The Ethics Commission's arguments for a lower level of scrutiny are unpersuasive.

A. The Severe First Amendment Burdens Imposed By The Disqualification Provision Are Subject To Strict Scrutiny

Let us begin with common ground: Both parties agree that the Nevada Supreme Court was correct in rejecting the test that the district court applied—the balancing test governing public employee speech under *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See* P.A. 60a. Under *Pickering*, a court weighs "the interests of the [public employee], as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. *Pickering*, we agree, is not "the most apt doctrinal analogy for this case." Pet'r 32 n.10. As the court below held, *Pickering* is inapposite because it deals with employment-related decisions, such as hiring and firing, rather than the sorts of regulations of democratic processes at issue here. P.A. 12a. But

having agreed that *Pickering* is inapt, the parties diverge widely on what to use instead. The Ethics Commission insists on a standard that is even more lax than *Pickering*, while we propose a standard that is stricter.

The correct standard is strict scrutiny. The Ethics Commission's ruling would surely be subject to strict scrutiny if it directly penalized Vasquez for volunteering on Councilmember Carrigan's campaigns or if it penalized the Councilmember for enlisting his aid in common cause. *See, e.g., Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (regulations that "burden the associational rights of political parties and their members" are subject to strict scrutiny). So too, if the Ethics Commission penalized Vasquez for lobbying in support of the Lazy 8. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010) ("Congress has no power to ban lobbying itself.").

"[T]he Constitution's protection," however, "is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Rather, First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Accordingly, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990).

By establishing a dynamic where a candidate is forced to choose between enlisting volunteers who

are especially politically active and safeguarding his duty to vote on issues of public importance, the Ethics Commission has burdened both rights. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977) (regulation is impermissibly coercive where "[i]t requires appellee to forfeit one constitutionally protected right as the price for exercising another"). And it has, in effect, accomplished indirectly what it could not constitutionally achieve directly.

FEC v. Davis, 554 U.S. 724 (2008), is instructive. There, this Court considered the so-called "Millionaires' Amendment," which provided that when a candidate spent significant personal funds on her campaign, the candidate's opponent could "qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated expenditures." *Id.* at 736. The law did not ban the self-funded candidate from spending her own money. But this Court described the law as "requir[ing] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.* at 739; *see also id.* at 740. The Court observed that "[t]he resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.* at 739. To the contrary, this Court found that the Millionaires' Amendment "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" and therefore could not stand "unless it [was] 'justified by a compelling state interest.'" *Id.* at 740 (internal citation omitted).

B. The Arguments For Lower Scrutiny Here Are Unpersuasive

The Ethics Commission's main argument is: "This Court has repeatedly upheld neutral state rules adopted to regulate the processes of self-government, emphasizing that such rules are ordinarily subject to deferential review even if they necessarily burden interests protected by the First Amendment." Pet'r 35. But as the Ethics Commission elsewhere acknowledges, *see* Pet'r 32–33, this Court has rejected a hard-and-fast rule that applies one level of scrutiny to all "the processes of self-government." Rather, this Court has held that "the rigorousness of [judicial] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). It has emphasized that the states' "power to regulate the time, place, and manner" of democratic processes "does not justify, without more, the abridgement of ... the freedom of political association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). And most important for present purposes, it has held that "strict scrutiny appl[ies]" "when ... a regulation imposes 'severe' burdens" on First Amendment rights. *Burdick*, 504 U.S. at 434.

So, the debate circles back to the question whether this disqualification provision imposes a "severe" burden. The Ethics Commission asserts that "any burden imposed by the Nevada recusal rule is a very limited one." Pet'r 38 (citation and internal quotation marks omitted). But in so arguing, it ignores the provision's most severe burdens: It focuses only

on "officials' use of voting for personal expression," *id.*, without so much as acknowledging all the associational burdens described above (and argued to the Nevada Supreme Court below) on the candidate and the campaign volunteer.

Shorn of its unique catch-all provision, the statute would be just like all the standard statutes, disqualifying a legislator for voting for a bill that advances her own pecuniary interests (or those of her husband, daughter, employer, or business partner). Such a provision would certainly not be subject to strict scrutiny. Intermediate scrutiny would be much more appropriate, for that is the level of scrutiny that applies to a variety of other expressive acts. *See, e.g., O'Brien*, 391 U.S. 367 (burning a draft card). Such a provision would easily survive any appropriate level of scrutiny. The state's interest in eliminating financial self-dealing by public officials is high, and only disqualification can ensure that a financially interested legislator does not corrupt the political process by voting to advance private economic gain. *Cf. id.* at 378 (government interest in administrative advantages of registration certificate substantial, and law prohibiting destruction of cards specifically protects that interest).

The Ethics Commission also argues that the disqualification provision leaves a legislator "free to communicate his views to his constituents and the public through public speaking, television appearances, newsletters, pamphlets, advertisements, telephone calls, personal visits, and emails." Pet'r 39. In point of fact, it does not, for it prohibits not just the vote but any effort to "advocate the passage or failure of" the measure. Nev. Rev. Stat.

§ 281A.420(2) (2007). Moreover, severe burdens on associational rights are subject to strict scrutiny, even where individuals are still free to speak their minds. *See, e.g.*, *Tashjian*, 479 U.S. at 217.

IV. THE DISQUALIFICATION PROVISION FAILS UNDER EITHER STRICT OR INTERMEDIATE SCRUTINY

The Nevada Supreme Court correctly concluded that the disqualification provision fails constitutional scrutiny, although it did not necessarily apply the most apt doctrinal labels for the various aspects of its analysis. Invoking the "substantial overbreadth" doctrine, the court at one point correctly stated that the provision was unconstitutional even if it could be constitutionally applied to Mr. Carrigan. P.A. 13a n.8. But that purported overbreadth analysis also advanced two additional constitutional arguments.

The first was vagueness. The court held that the "catchall language fails to adequately limit the statute's potential reach *and does not inform or guide public officers as to what relationships require recusal*." P.A. 17a (emphasis added). In support of that conclusion, the court observed that "[t]here is no definition or limitation to subsection 8(e)'s definition of any relationship 'substantially similar' to the other relationships in subsection 8," *id.*, and concluded that the provision "fails to sufficiently describe what relationships are included," P.A. 16a; *see also* P.A. 8a n.5 (framing the question as whether statute has "sufficient limitation and clarity"). Thus, although the court dropped an early footnote saying that "we need not address Carrigan's vagueness ... argument[]," P.A. 6a n.4, it obviously was (as the dissent

noted) addressing a vagueness argument, *see* P.A. 37a n.7.

Second, under the overbreadth analysis, the court also held that the catch-all provision "fails ... to meet the 'narrowly tailored' requirement." P.A. 16a.

The court was correct on all these points. Consistent with the court's emphasis, we begin with vagueness. *See infra* Point IV.A. We then demonstrate that the provision does not advance a governmental interest that is even legitimate, much less important or compelling. *See infra* Point IV.B. Finally, we show that the provision is substantially overbroad and underinclusive and burdens more speech than necessary to achieve the stated objectives. *See infra* Point IV.C.

A. The Provision Is Unconstitutionally Vague

The court below was correct that the catch-all disqualification provision is so hopelessly vague that people of "common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The provision's plain terms do not provide fair warning that it applies to a relationship like Councilmember Carrigan and Vasquez's.[5]

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[5] The dissent below mistakenly asserted that "Carrigan does not contest the Ethics Commission's findings, which the district court upheld, that [his] relationship with Vasquez was disqualifying." P.A. 33a. In fact, Councilmember Carrigan argued emphatically that "Mr Vazquez' participation in [his] campaigns" was "not a 'business relationship' that is 'substantial and con-

Vasquez is obviously not a "member of [Carrigan's] household," is not "related to [Carrigan] by blood, adoption or marriage within the third degree of consanguinity or affinity," and does not "employ[] [Carrigan] or a member of his household." Nev. Rev. Stat. § 281A.420(8) (2007). And as the Ethics Commission tacitly concedes, the two do not have (and surely do not plainly have) a "substantial and continuing business relationship." As the Ethics Commission found, "Vasquez and his companies did not make any profit from [his] services" even when acting as middleman in some transactions. P.A. 44a.

Instead, the Ethics Commission argues only that a campaign manager is "substantially similar" to one of these enumerated relationships—specifically (it now tells us) to a "business relationship"—and Councilmember Carrigan was supposed to know that. Pet'r 51–52 n.13.[6] The record proves the opposite.

First, even the most intelligent layperson reading the statutory language should not be expected to know that this relationship is "substantially similar" to a business relationship, where a City Attorney, in

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tinuing,' or a relationship that is 'substantially similar' to any other relationship included in NRS 281A.420(8)." A.O.B. 9.

[6] Notably, the Ethics Commission distances itself from the position of the district court and the Nevada Legislature, that the relationship was disqualifying merely because it was a "close, substantial and continuing relationship." P.A. 80–81a; *see, e.g.*, Nev. Legis. Br. 32 ("close, significant, and continuing relationship with another person") No one could ever know for sure what relationships a bare majority of the Ethics Commission would retroactively deem too "close" for comfort. Local party leaders? Confidantes? Running partners? Dinner companions? Book club members?

an extensive analysis, concludes the opposite. Councilmember Carrigan was intelligent enough to land fighter planes on aircraft carriers, but he should not have been expected to override the City Attorney's well-founded conclusion that the disqualification provision captures only relationships where the subject "stood to reap either financial or personal gain or loss as a result of his official action." P.A. 99a. The attorney's conclusion was reasonable under the "interpretative canons of *noscitur a sociis* and *ejusdem generis*," under which the catch-all provision's "general words" are "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington v. Guardianship Estate*, 537 U.S. 371, 383 (2003). A layperson of "common intelligence" should not even be expected to have heard of those canons, much less to second-guess learned counsel's application of them.

Second, the Ethics Commission never explains how it expected Councilmember Carrigan to know that his relationship with Vasquez is "substantially similar" to a "business relationship," when one Commissioner confesses, "I don't necessarily believe that there was a substantial and continuing business relationship," J.A. 247, and another says, "substantially similar to a substantial and continuing business relationship gives me pause," J.A. 245. If the Commissioners' views were so disparate and tentative that they could not agree on which enumerated relationship the Vasquez relationship was most like—and so declined to specify, P.A. 105a—then Councilmember Carrigan should not be expected to do any better.

The Ethics Commissioners were not the only who had difficulties with the taxonomy. In upholding the censure, the district court opined that "Carrigan and Vasquez had a substantial and continuing *political, professional* and *personal* relationship." P.A. 62a (emphasis added). Not one of those words is in the provision.

In short, the best Councilmember Carrigan could be expected to do was to "guess at [the provision's] contours." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991). That is especially true here because the phrase "substantially similar," like the terms "general" and "elaboration" at issue in *Gentile*, is a "classic term[] of degree." *Id.* at 1048–49. In the "context" here, the term has "no settled usage or tradition of interpretation in law." *Id.* at 1049. "The [official] has no principle for determining when his [relationships] pass from the safe harbor" of the insubstantially similar to the "forbidden sea" of the substantially similar. *Id. Compare Roberts v. U.S. Jaycees*, 468 U.S. 609, 630 (1984) (use of "familiar standards" "ensure[d] that the reach of the statute is readily ascertainable").

In *Gentile*, this Court opined that "[t]he fact that [the speaker] was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that [the rule] creates a trap for the wary as well as the unwary." 501 U.S. at 1051. Here, however, Councilmember Carrigan's effort was not just conscious, but conscientious. This provision set a trap for the hyper-vigilant.

The Ethics Commission contends that Councilmember Carrigan should have known what the pro-

vision means because of an isolated snippet of legislative history discussing a relationship with a "person [who] ran your campaign time, after time." P.A. 69a (quoting *Hearing on S.B. 478 before Senate Comm. on Gov't Affairs*, 70th Leg. 42 (Nev. Mar. 30, 1999)); *see also* P.A. 104a; J.A. 253–54. The sentence came not in a committee report, nor even from a legislator. It came from the governor's representative. Witness statements like this occupy such a lowly status in the hierarchy of legislative materials, that this Court would probably not even consider it *relevant*. *See* William N. Eskridge, Jr., et al., *Cases and Materials on Legislation, Statutes and the Creation of Public Policy* 1019 (4th ed. 2007) (observing that "the Court will not rely on" statements by public, nonlegislative officials who draft or promote statutes "as the most probative—and certainly not the *only*—evidence of statutory meaning").

But the snippet would make no difference even if it were more reliable. "Ordinary people cannot be expected to undertake such an analysis [of legislative history]; rare is the lawyer who could do it; and no two lawyers could be expected to agree." *United States v. Rybicki*, 354 F.3d 124, 160 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting); *see Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring) ("To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.").

The Ethics Commission also makes much of the opportunity a legislator has to "seek confidential guidance from the Commission as to 'the propriety of

[their] ... future conduct,' Nev. Rev. Stat. § 281A.440(1) (2009), and about whether a particular relationship requires recusal." Pet'r 54. That is not much of an option in the heat of a legislative battle, especially inasmuch as the Commission is allowed to sit on the request for 45 days. Nev. Rev. Stat. § 281A.440(1) (2009).

More importantly, the freedom to seek an agency's advice does not address the most significant First Amendment burden: the one that occurs *long before* a legislative vote, when the candidate and the volunteer are deciding whether to associate together and may not even know how close their relationship will end up being. As insightful as the Ethics Commission may be about "future conduct," it cannot actually *tell* the future. It cannot opine on what sorts of votes are likely to arise, which ones are likely to excite the campaign volunteer to legislative action, and what clients will materialize to seek his services. Moreover, even if an aspirant to office or prospective volunteer could be sure about an upcoming vote, the Ethics Commission cannot help them, because it is not allowed to issue opinions to anyone but a sitting "public official or employee." Nev. Rev. Stat. § 281A.440(1) (2009); *see Buckley*, 424 U.S. at 40 n.47 (observing that reliance on the FEC to cure ambiguity in the law "is unacceptable because the vast majority of individuals and groups subject to criminal sanctions for violating [the law] do not have a right to obtain an advisory opinion from the Commission").

Finally, the Ethics Commission insists that this sort of catch-all provision is essential to the administration of ethics laws. Pet'r 52. But the very sugges-

tion is belied by the reality that no other state feels the need to do so. *See supra* at 19–21.[7]

In sum, this case presents the classic situation where a vague law "trap[s] the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). And "[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 282 (1961).

But this case also illustrates an additional—perhaps even graver—problem of vague statutes regulating the political process: The catch-all disqualification provision here "impermissibly delegates basic policy matters" to those charged with interpreting and enforcing the law, "with the attendant dan-

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[7] In contrast, judicial recusal provisions are often more open-ended. *See, e.g.*, 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). But these provisions are different for two reasons. First, they are often left to the judge's own discretion to implement, and to the extent that there is any enforcement it is usually only for the clearest of violations. *See, e.g.*, Leslie W. Abramson, *Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo J. Legal Ethics 55, 55–56 (2000) ("Currently, the meaning and application of the [Model Code] standard," requiring recusal when a judge's "impartiality might reasonably be questioned," "is left to the discretion of the trial judge ...."). Second, the state has a far more fundamental—indeed, constitutionally imposed—imperative to safeguard against any possibility of judicial favoritism. *See infra* at 53–55 So there is less of a concern of a judge erring on the side of recusal.

gers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109. The First Amendment's vagueness doctrine is designed "in part" to combat "a kind of standardless discretionary authority" that "[v]ague laws delegate to administering officials." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive In First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 457 n.117 (1996). "The fundamental purpose of this rule barring standardless discretion thus resides in its capacity to assist in the campaign against impermissible motive." *Id.* at 457.

This case is both an object lesson and a warning of the mischief to come if this Court sustains the catch-all provision: Private interests armed with vague standards will co-opt unelected agencies to override losses sustained in the political process. The Ethics Commission did not thrust itself into this political brawl. It was dutifully responding to a complaint that came at the instigation of the political loser. The Nugget solicited complainants to file an ethics complaint against Councilmember Carrigan. R.O.A. 449. Two identical ethics complaints were filed on the same day. R.O.A. 75–90, 450–451. The complainants are co-plaintiffs in a lawsuit filed by the Nugget, P.O.B. Exhibits 3 & 5, and one of the complainants emailed the Nugget's chief executive thanking her for the help in preparing the complaint, R.O.A. 452.

None of this would have been possible if the disqualification provision had been clear. Conversely, if this Court blesses this provision, it will open a new avenue for end-runs around the democratic process.

B. The State Has No Legitimate, Much Less Compelling, Interest In Prohibiting A Vote Based On Political Loyalty

Vagueness is not the only constitutional flaw. The provision would be unconstitutional even if it had enumerated "campaign manager or other key campaign volunteer" as a disqualifying relationship. Such a disqualification does not advance any legitimate government interest, much less an important or compelling one.

We can stipulate that disqualification rules *generally* are necessary to "maintain 'integrity in the discharge of official duties' and prevent misuse of the office *for private ends*." Pet'r 33 (emphasis added). We agree, also, that "[r]ecusal rules embody the principle that 'no man may serve two masters,' in 'recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their *personal economic interests* are affected by the business they transact on behalf of the Government.'" *Id.* (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 549 (1961)) (emphasis added). These are compelling state interests.

The problem is that these interests have nothing to do with this case. This case is not about Councilmember Carrigan's "personal economic interests." It is about his *political* interests. It is about a perceived problem with political "loyalties," P.A. 112a, with a candidate's "feeling of debt" that "I'm here because this person got me elected and has kept me elected," J.A. 250–51.

The Ethics Commission aspires to achieve a sterile political utopia in which elected officials make all their political decisions free from these sorts of political "debts." But such a utopia (if that is what is) is unattainable, foreign to our democracy, and unconstitutional. The concern that a legislator may act out of economic interest (whether for himself, his spouse, his employer, or his business partner) is fundamentally different from the concern that he will act out of political "loyalty." The former is called "self-dealing" or "corruption"; the latter is called "politics."

No state should be permitted to treat "political loyalty of the purest sort" as a new-fangled sort of corruption. *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). "'It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.'" *Citizens United*, 130 S. Ct. 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)). "There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular." *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The Ethics Commission has not adduced a shred of evidence—or argument—to show that there is something about the relationship between a campaign volunteer (or, more specifically, the campaign manager) and the candidate that makes it especially susceptible to abuse. It merely "'posit[s] the existence of the disease sought to be cured,'" which, even

under intermediate scrutiny, will not do. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citation omitted).

To sustain the Ethics Commission's purported interest is to expose a wide range of political debts to state regulation. If Vasquez's relationship with Councilmember Carrigan is corrupting because he was "instrumental in the success of ... Councilman Carrigan's elections," P.A. 104a, then the same would go for any number of equally "instrumental" relationships: the NRA or NAACP activist who rallies the troops to register voters or get out the vote; the party boss or celebrity who delivers a high-profile endorsement; the captain of industry who organizes a dinner for the nascent candidate to meet other well-heeled supporters. The list is endless, and deeply troubling.

"'It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another,'"—or to endorse a candidate or throw armies of members at a vote drive—"'is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.'" *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

The state could not directly limit any of these activities, of course. And it seems just as plain that it may not burden these activities by prohibiting a legislator from voting on an issue that is important to any of these political allies and supporters. Other-

wise, disqualification provisions would be an easy back-door route toward reviving all sorts of burdens on speech and association that, however well-intentioned, this Court has consistently and emphatically struck. *See, e.g., id.* at 914 (striking direct prohibition on corporate independent spending); *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (striking spending limit); *Eu*, 489 U.S. at 228-29 (striking ban on political party endorsements of candidates during nonpartisan primaries).

This responsiveness and accountability are the key features that distinguish restrictions on elected *representatives* from the restrictions on elected *judges* that this Court imposed in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). There, a state supreme court justice declined to recuse himself from an appeal in which one litigant devoted some $3 million to get the justice elected. *Id.* at 2264. The opposing party claimed a due process violation. This Court agreed, holding that, under those "extreme facts," due process demanded recusal. *Id.* at 2265.

"Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech." *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (Posner, J.)). "Judges ... are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency." *Republican Party of Minn.*, 536 U.S. at 806 (Ginsburg, J., dissenting) (citation omitted). While a legislator may—and would be expected to—give preference to her political suppor-

ters, a judge never should. So the litigant who supports the judge—unlike the lobbyist who supports the legislator—has no First Amendment right to use politics to influence the judge and no legitimate expectation of succeeding in doing so. *Citizens United*, 130 S. Ct. at 910 ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.").

It was the judicial role that was front and center when this Court opined that "that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 129 S. Ct. at 2263–64. But that concern about the judiciary does not translate to a political environment precisely because judges are supposed to be impervious to the sorts of political influences that are the stock and trade of politics.[8]

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[8] All the same points about judges apply with equal force to adjudicative agencies. *See* Pet'r 46 (raising concern about agencies). Amicus Nevada Legislature plainly recognizes the differences between adjudicators and political representatives, which is why it argues that different standards should apply because the Lazy 8 zoning determination is administrative (or quasi-judicial) rather than legislative. Nev. Legis. Br. 16. As a threshold matter, the Nevada Supreme Court rejected the notion that the Lazy 8 vote was quasi-judicial in nature, P.A. 10–11a & n.7 (explaining that the vote was on a public issue, and thus was a "core legislative function"), and the Commission has now waived the issue. But amicus's characterization is wrong anyway. In Nevada, "zoning is a matter within sound legisla-

Unlike a party to a case, the Nugget, or any other opponent of the Lazy 8, has no due process rights in a legislator purged of political loyalty. But even if it did, the political loyalty here is nothing compared to the "extreme facts" that led this Court to find a due process violation in *Caperton*, 129 S. Ct. at 2265, where the supporter spent a king's ransom solely because he wanted to rig the bench with a justice who would sit on his company's own case, *see id.* at 2257. Vasquez had nowhere near such "significant and disproportionate influence," *id.* at 2264, on Councilmember Carrigan's reelection or on his vote, which was based on a position he staked out long before the Lazy 8 hired Vasquez to press its case.

C. The Disqualification Provision Is Overbroad And Underinclusive And Burdens More Speech Than Necessary To Advance The Asserted Interest

Even if the Ethics Commission had a compelling or important interest in guarding against the influence of political loyalty on a legislator's vote, the means Nevada has chosen fails scrutiny.

Overbreadth & underinclusiveness. As an initial matter, the catch-all disqualification provision is both overbroad and underinclusive. We confess a bit of a quandary in explaining why, because neither the Ethics Commission nor the Legislature has defined

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tive action." *Nova Horizon, Inc. v. City Council of Reno*, 769 P.2d 721, 722 (Nev. 1989) (quoting *McKenzie v. Shelly*, 362 P.2d 268, 269–70 (Nev. 1961)) (city council decision to deny a special use permit was a legislative action); *see supra* at 6–7 (explaining City Council's approval power) And this particular dispute was about as political as it gets.

with any level of clarity which relationships are within the statute and which are outside. *See supra* 42–48 (describing vagueness problem). But one observation on each point suffices.

First, the provision is underinclusive so long as the Ethics Commission has chosen to single out some brands of political "loyalties" for special burdens to the exclusion of others that raise the same concerns. As noted above, all sorts of political supporters—independent spenders, endorsers, get-out-the-vote drivers, and so on—can raise graver concerns of political "debt" than a volunteer campaign manager. *See supra* at 51–53. Either all these relationships should be disqualifying or none of them should be. And the Ethics Commission has never indicated that they all are. This "underinclusiveness ... raises serious doubts about whether [the state] is, in fact, serving ... the significant interests [it] invokes in support of" constitutionality. *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

Second, the Nevada Legislature has now formally taken the position that the statute is even broader than the Ethics Commission has suggested, so as to cover: any "close, significant and continuing relationships that ... are strictly comparable, alike in substance or essentials, analogous or parallel to the expressly listed relationships." Nev. Legis. Br. 32. That pronouncement not only compounds the vagueness problems already discussed, but sweeps in droves of constitutionally protected relationships with even less influence than a campaign manager.

Tailoring. Whatever its exact scope, the disqualification provision "'burden[s] substantially more

[First Amendment activity] than is necessary to further'" those interests. *Turner Broad.*, 512 U.S. at 662 (citation omitted). Even if it is reasonable to be leery of various political relationships—or close personal ones—it does not follow that the appropriate governmental response is to make the parties choose between not forming the relationship and disqualifying the legislator. The most obvious alternative is disclosure, which "is a less restrictive alternative to more comprehensive regulations of speech" and associational activity. *Citizens United*, 130 S. Ct. at 915 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)).

When a relationship directly impacts a legislator's pocketbook, disclosure might not suffice. Thus, for example, this Court has upheld contribution limits on the ground that the disclosure option does not sufficiently protect against corruption and the appearance of corruption. *See Buckley*, 424 U.S. at 28. But when a relationship has no such direct impact on the official's finances, this Court has typically deemed disclosure to be the appropriate first resort. Thus, for example, this Court has "upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures." *Citizens United*, 130 S. Ct. at 915 (citing *Buckley*, 424 U.S. at 75–76). And it has "upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself." *Id.* (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

That rule applies here. If, in fact, political loyalty is corrupting at all, it is much less corrupting than money in the pocket or even than independent

spending. So any regime to address the influence of political loyalty on a legislator should revolve around forcing legislators to do exactly what Councilmember Carrigan did here: Describe the relationship in question on the record. Armed with that knowledge, the public can decide whether a public official has overstepped the boundaries of political-loyalty correctness. In this case, Councilmember Carrigan's political enemies and the press played up the disclosure in the weeks leading up to the election. *See, e.g.*, R.O.A. 77 (complaint); J.A. 197. Had voters shared the Ethics Commission's passion for political purity, they would not have reelected him by a landslide. J.A. 173–74.

* * *

The Ethics Commission's prediction of legislative roadkill in the event of an affirmance ignores the salient features of the Nevada law at issue. The Nevada statute is unique on its terms and uniquely hostile to First Amendment values. No one knows what the law means—not Councilmember Carrigan, not the City Attorney, not even the Commissioners who would enforce it. It was this vagueness that permitted the Ethics Commission to be played as a pawn in a larger political game between rival casinos. Political "loyalties" should be embraced as the fabric of our democracy, not vilified as corrupting. The Ethics Commission must make a far greater showing than it has before stripping a legislator of his vote, a candidate of his campaign volunteer, a volunteer of his candidate, and a voting citizenry of its representative. The Nevada Supreme Court

properly rejected the Ethics Commission of its self-appointed role as the police of political purity.

CONCLUSION

This Court should affirm the Nevada Supreme Court's judgment.

Respectfully submitted,

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APPENDIX

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<<signature>>
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE ATKINSON GATES.

Petitioner,

Case No. A393960
Dept. _____
No.
Docket "G"

vs.

THE COMMISSION ON ETHICS,
an agency of the State of Nevada; the STATE OF NEVADA; and DOES 1-20

_____/

DECISION

This matter arises out of an investigation by the Nevada Commission on Ethics (hereinafter "NCOE") of Petitioner Yvonne Atkinson Gates, Chairperson of the Clark County Commission. Petitioner was investigated concerning her

involvement in the granting of concession contracts in Terminal "D" of McCarran International Airport in Las Vegas Nevada, which is owned and operated by Clark County.

Host Marriott is the master concessionaire for food and beverage concessions at the Airport, and WH Smith is the master concessionaire for other retail concessions. Pursuant to agreements with these master concessionaires, thirteen concessions in the new terminal "D" would be granted to Disadvantaged Business Enterprises (hereinafter "DBE"). Under federal law, DBEs are businesses in which at least 51% of the ownership of the business is held by a member or members of federally-recognized minority classes, namely racial minorities, ethnic origin minorities, and women.

Due to previous problems encountered in the selection process for Airport concessions, a system was designed whereby the master concessionaires would, without input from the Clark County Commission, select the 13 DBEs to operate in Terminal "D." The County Commission would then have the opportunity to approve or reject the applicants chosen by the master concessionaires.

Prior to the close of the application process, Petitioner placed certain names on a list of applicants that she felt the County Commission would support if they were selected by the master concessionaires. Included on this list were Michael Chambliss and Judy Klein. Petitioner had known Chambliss for 17 years. Chambliss had served on Petitioner's campaign for her County Commission

seat, and he served as Petitioner's "eyes and ears" in the Las Vegas Community. Klein was known to Petitioner as an active member of the Democratic party in Las Vegas, as well as a fundraiser who had organized hundreds of thousands of dollars to be contributed to Petitioner's campaign funds.

This list eventually made its way to the master concessionaires before the application process was closed to the public. This list then became the *de facto* list of applicants that the master concessionaires chose to grant the concessions to. This list of applicants was then approved by the Clark County Commission. Petitioner did not disclose her relationship with either Chambliss or Klein, and voted to approve them as concessionaires.

When information came to light that Petitioner had written a list of applicants who received contracts, a public uproar ensued. Two third-party requests for an opinion from the NCOE were requested by citizens, and the NCOE also decided by its own motion to investigate this matter.

On June 27, 1998, after the investigation was complete, Petitioner was found to have violated NRS 281.481(2) by placing Michael Chambliss' name on a list of concessionaires that the Clark County Commission would support. Petitioner was also found to have violated NRS 281.481(2) by placing Judy Klein on that same list.

Petitioner was then found to have violated NRS 281.501(3)(b) by not disclosing her relationship with Michael Chambliss before voting to grant him a

concession contract. Petitioner was also found to have violated NRS 281.501(3)(b) by not disclosing her relationship to Judy Klein before voting to grant her a concession contract.

Next, Petitioner was found to have violated NRS 281.501(2)(c) by not abstaining from voting to grant Michael Chambliss a concession contract. Petitioner was also found to have violated NRS 281.501(2)(c) by not abstaining from voting to grant Judy Klein a concession contract.

Notwithstanding the fact that Petitioner was found to have violated these ethical rules, Petitioner was found not to have violated NRS 281.481(2), NRS 281.501(2)(c) or NRS 281.501(3)(b) wilfully. 'Wilfully' as used by the NCOE is a term of art meaning that sanctions should be imposed on the subject of the investigation. Therefore, no penalties and no sanctions were imposed on Petitioner.

Petitioner filed a Petition for Judicial Review and a Complaint for Declaratory Relief. Petitioner advanced four main arguments: (1) That NRS 281.481(2), NRS 281.501(2)(c) and NRS 281.501(3)(b) are unconstitutionally vague; (2) That the NCOE engaged in "ad hoc" rulemaking by expanding the Nevada Ethics in Government Law without legislative permission; (3) That the make-up of the NCOE violates the Separation of Powers doctrine; and (4) That the NCOE itself was an unlawful delegation of legislative authority.

This Court's review of the decision of the NCOE is dictated by NRS 233B.135 which controls

judicial review of an agency decision. The Nevada Supreme Court has also given guidance to a district court reviewing the decision of the NCOE. In Nevada Commission on Ethics v. JMA/Lucchesi, 110 Nev. 1 (1994), the Court wrote that a district court should give great deference to the decision of the NCOE, as they were vested with the power to "construe" the Nevada Ethics in Government Law. Id. at 5-6.

However, the Nevada Supreme Court has also held that the district court has the power to conduct a *de novo* review of an agency's interpretation of a statute. In Department of Motor Vehicle and Public Safety v. Jones-West Ford, Inc., 114 Nev. 766 (1998) the Court wrote that "[a] reviewing court may decide pure questions of law without affording the agency any deference . . . A 'pure legal question' is one 'that is not dependent upon, and must necessarily be resolved without reference to any fact in the case before the court. An example . . . might be a challenge to the facial validity of a statute.'" Jones-West Ford, 114 Nev. at 770 (Quoting Beavers v. State, Dep't of Mtr. Vehicles, 109 Nev. 435, 438 (1993)). See also Manke Truck Lines v. Public Service Comm'n. 109 Nev. 1034, 1036-37 (1993) (holding that questions of statutory construction are purely legal issues to be reviewed without any deference whatsoever to the conclusions of the agency).

Thus, this Court has the power to decide *de novo* whether these sections on the Nevada Ethics in Government are unconstitutionally vague, and

whether the NCOE exceeded its authority in its interpretation of these statutes.

A. ARE NRS 281.481(2), NRS 281.501(2)(c) AND NRS 281.501(3)(b) UNCONSTITUTIONALLY VAGUE?

The Nevada Supreme Court has spoken on the issue of whether a statute is unconstitutionally vague. In State of Nevada v. Glusman, 98 Nev. 412, 420 (1982), the Court held that a statute is vague if the statute "'either forbids or requires the doing of any act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application'" (quoting Connally v. General Construction Co., 269 U.S. 385 (1926)). Therefore, "a statute must provide to a person of ordinary intelligence adequate notice of what conduct is prohibited and sufficient guidelines to preclude arbitrary and discriminatory enforcement of the statute." Erwin v. State of Nevada, 111 Nev. 1535, 1543-44 (1995). However, there is no command that a legislature list each and every command with perfect specificity. As the Nevada Supreme Court held in Woofter v. O'Donnell, 91 Nev. 756 (1975) The Nevada Constitution does not require the legislature to draft legislation with impossible standards of specificity.

In interpreting an allegedly vague or ambiguous statute, there are several factors that the court must consider. The overriding factor is the purpose and intent of the legislature in enacting the statute. In State of Nevada v. Glusman, 98 Nev. 412, 425 (1982), the Court wrote that, "[t]he words of

a statute should be construed, if reasonably possible, so as to accommodate the statutory purpose." Also, in Woofter v. O'Donnell, 91 Nev. 756, 762 (1975), the Court held that, "[w]here the intention of the Legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute so as to give it force and not nullify its manifest purpose." See also 73 AmJur 2d Statutes §145 , which states that, "[i]n the interpretation of statutes, the legislative will is the all-important or controlling factor."

A district court must also attempt to construe the statute as constitutional if possible. "Where the intent of the legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute to effectuate rather than nullify its manifest purpose." Sheriff of Washoe County v. Martin, 99 Nev. 336, 340 (1983).

Therefore, this Court is instructed to attempt to interpret these statutes in a way that will preserve the constitutionality of the statute, further the intent of the legislature when the statutes were enacted, and give some deference to the interpretation given the statute by the NCOE.

The legislative declaration and findings concerning the Nevada Ethics in Government Law are contained in NRS 281.421. The statute states that "[a] public office is a public trust and shall be held for the sole benefit of the people." It also states that "[a] public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he

serves." The legislature found that the increasing complexity of life enlarges the potentiality for conflict of interests, and, in order to enhance the people's faith in the integrity and impartiality of public officers and employees, guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

In a joint hearing between the Senate Government Affairs and Assembly Elections Committees held on March 28, 1977, the Senators and Assemblymen seemed most concerned about public employees using their positions for personal monetary gain.

Assemblyman Mann stated that a conflict of interest should be when some legislation that a legislator is involved in results in a monetary gain for him. Joint Hearing Report, p. 2. Senator Raggio agreed with this, saying that ethics should deal with the problem where a legislator is financially rewarded because of introducing a measure that a client wanted. Id. at p. 3. Assemblyman Dini said that the basic concept of the code of ethics is that nobody should be trying to line their pockets by serving in a public office. Id. at p. 4.

Because there is no specific mention of "friendships" or "cronyism" in the legislative history, Petitioner argues that the Legislature was not concerned with the type of relationships that are at issue in the instant case. In response, the NCOE argues that the Legislature was concerned about any transaction that would bring the government

negative publicity and make the public think that the government was acting unethically. However, while the Legislature may have intended to include friendships and other relationships of this type in the Ethics in Government Law, it has failed to do so in the 22 years since this law was passed, as it has been amended in some way in nearly every Legislative session. So far, the Legislature has failed to include such a broad definition to this law.

1. Analysis of vagueness of NRS 281.481(2)

Petitioner argues that the phrase "any other person" is unconstitutionally vague as used in NRS 281.481(2), as it fails to provide adequate notice of what conduct is prohibited. A strict, straightforward reading of the statute would prohibit a public officer or employee from using his position to secure or grant "unwarranted privileges, preferences, exemptions or advantages" for himself or any other person.

However, the petitioner argues that the phrase "any other person" was meant only to refer back to the phrases "himself," "any member of his household" and "business entity in which he has a significant pecuniary interest." Petitioner urges the use of the doctrine of *ejusdem generis*, whereby "[g]eneral and specific words in a statute which are associated together, and which are capable of an analogous meaning, take color from each other, so that the general words are restricted to a sense analogous to the less general." Orr Ditch Co. v. District Court, 64 Nev. 138, 147 (1947). If this doctrine were followed, then the phrase "any other

person" would only apply to a person who is a member of the employees household, or persons with whom the employee had a business relationship.

Following this line of argument, Petitioner urges this court to interpret the phrase "any other person" to actually mean "any other such person," thus limiting the phrase to the public employee himself, the employee's family, or a business entity in which the employee is involved to a significant degree.

In reply, the NCOE urges this Court to liberally interpret the phrase as the NCOE did, allowing "any other person" to take on its literal meaning, thus precluding the employee from granting unwarranted privileges to anyone. The purpose of the Nevada Ethics in Government Law, which is to instill confidence in the general public that public employees are not out to line their own pockets, or use government to further their own interests, gives some support to this contention.

Further, there is support for the proposition that the legislature purposely phrased the Nevada Ethics in Government Law in general language so that it would apply to a variety of distinct situations. In fact, Senator Bryan stated that it would be impossible to draft ethics legislation that would cover every possible case. Id. at p. 3. The NCOE is specifically empowered, under NRS 281.511(2) with the task of rendering an opinion "interpreting the statutory ethical standards" and applying those standards to a given set of facts and circumstances.

However, if the Legislature intended this statute to cover every situation and person imaginable, then it could have simply stated that a public officer could not secure an unwarranted privilege for "any person." Because the Legislature, a very deliberate body, took the time and effort to qualify this phrase by listing family and business relationships, neither the NCOE nor this Court can simply expand the meaning to every person imaginable. If the Legislature feels that this would be the wiser course of action, it is free to amend this language at the next legislative session.

The Legislature has chosen not to include "friendships" or "cronyism" in the language of NRS 281.481. This section had never been interpreted to include "friendships" or "cronyism." However, there is an argument that a literal reading of the statute would include these relationships.

This statute cannot be fairly said to give clear notice to a person of reasonable intelligence that granting a privilege to "any person" may be a violation of the statute. It is not clear when a public employee or officer may come under the scrutiny of the NCOE based on this section of the statute. As demonstrated by recent political activities in Las Vegas, it has left many politicians guessing as to whether their actions are a violation of this statute. Therefore, the statute is unconstitutionally vague.

2. Analysis of vagueness of NRS 281.501(2)(c) and NRS 281.501(3)(b)

The petitioner argues that NRS 281.501(2)(c) and NRS 281.501(3)(b) are vague due to their use of the phrase "commitment in a private capacity to the interest of others." Petitioner feels that the phrase has no established legal meaning and makes no sense. Petitioner also argues that this phrase has never been used in a statute before in Nevada, and is not used in ethics statutes of other states. The petitioner argues that, since this statute's enactment in 1977, it has never been interpreted to apply to relationships such as the Petitioner had with Chambliss and Klein. Petitioner finally argues that no one can honestly assert that a well-settled and ordinary meaning of this phrase can be derived from common understanding, since current public officers and employees are unsure about what the phrase means. Therefore, petitioner argues that, because the statute is so vague, she was not put on notice of what type of behavior was prohibited.

In response, the NCOE argues that the statute has not been interpreted to include friendships only because the issue has not previously been brought to the attention of the NCOE. Also, the NCOE argues that, since the statute is aimed at whether or not a reasonable person's judgment would be affected by such a commitment to the interests of another, it would be impossible to list in the statute every situation where an abuse could possibly exist. Rather, the NCOE believes that the legislature chose to leave the determination to the NCOE, which could then apply a "reasonable person"

standard to the broad range of factual situations that would come before them in the ensuing years.

Examining the plain language of the statute, it seems clear that NRS 281.501(2)(c) commands a legislator not to vote on a matter if their judgment would reasonably be materially affected by the interests of another in a private capacity. The statute goes on to say that the judgment of a reasonable person would not be materially affected where the resulting benefit accruing to him or the other person whose interest to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. NRS 281.501(3)(b) commands a legislator to disclose any type of relationship which would reasonably affect his judgment before voting, abstaining or otherwise acting on a matter.

This means that, if there is no special benefit going to a public employee or to another person through the public employee, then there is no reason to think that the public employee's judgment would be affected by the relationship. However, if the public employee or the other person stands to gain something of value that was not available to everyone else in that person's group, then there would be a danger that the independent judgment of the public employee might be threatened. In such cases, the public employee should first disclose the relationship, and then should either vote or abstain from voting, based on the seriousness of the relationship and the commitment to the interest of another in a private capacity.

The question then becomes whether Petitioner was put on notice that, if a friend or acquaintance came before the Clark County Commission, Petitioner had to disclose her relationship and perhaps abstain from voting on the matter. This Court finds that Petitioner was not given the required notice. The statute had never been used to require a Legislator or other public employee to disclose and abstain from every vote where a friend or acquaintance came before the body.[1] As both parties acknowledge, Nevada is still a fairly small state where people still know each other. Especially in the political arena, it is virtually impossible to conduct business without developing friendships and acquaintances like those at issue. If public officers

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[1] It is interesting to note that, in the 1999 legislative session, the Legislature again refused to define this statute to encompass all type of relationships. The most recent amendment to NRS 281.501 reads:

8. As used in this section, "commitment in a private capacity to the interest of others" means a commitment to a person:

(a) Who is a member of his household;

(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs him or a member of his household;

(d) With whom he has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this section

Therefore, even under the latest amendment by the Legislature, which occurred after this NCOE' investigation and Opinion, the phrase "commitment in a private capacity to the interests of others" still would not specifically cover the relationships at issue in this case.

and employees were required to abstain from voting on every issue where a friend was involved, government as we know it would come to a standstill.

Therefore, this Court finds that NRS 281.481(2), NRS 281.501(2)(c) and NRS 281.501(3)(b) are all unconstitutionally vague, as they did not give Petitioner the notice and the knowledge necessary to avoid violating the statutes as they have been interpreted by the NCOE. If the Legislature wishes to include these relationships in the future, it is the body that will have to specify such relationships more clearly in the statutory language.

B. DID THE NCOE ENGAGE IN IMPERMISSIBLE "AD-HOC" RULEMAKING?

The Petitioner argues that NCOE engaged in impermissible "ad hoc" rulemaking because the NCOE exceeded its authority in its interpretation of the term "any other person" as contained in NRS 281.481(2), and the term "commitment in a private capacity to the interests of others" as contained in NRS 281.501(2)(c) and NRS 281.501(3)(b). Petitioner argues that such an interpretation was actually a "regulation" and should have gone through the Legislature pursuant to NRS 281.471(5).

In reply, the NCOE argues that it simply interpreted the existing statute. This did not include defining any new terms or enacting any new

regulations, so it should not be considered "ad hoc" rulemaking. Further, the NCOE argues that, under Nevada Commission on Ethics v. JMA/Lucchesi, 110 Nev. 1 (1994), the NCOE has the explicit authority to interpret and apply the Nevada Ethics in Government Law.

NRS 233B.038 defines a "regulation" as:

> "an agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirement of any agency. The term includes a proposed regulation and the amendment or repeal of a prior regulation, but does not include: (1) a statement concerning only the internal management of an agency and not affecting private rights or procedures available to the public; (2) a declaratory ruling; (3) An intra agency memorandum; (4) an agency decision or finding in a contested case; or (5) a regulation concerning the use of public roads or facilities which is indicated to the public by means of signs and signals."

Administrative agencies are not allowed to make regulations beyond the scope of the statute

which empowers and creates the administrative agency. In this case, the NCOE would be regulated by NRS 281.455, which creates the NCOE and NRS 281.471, which defines the duties of the NCOE. While NRS 281.471 gives the NCOE the power to create rules and regulations concerning the internal workings and procedures of the Commission, NRS 281.471(5) requires that the Commission "[r]ecommend to the legislature such further legislation as the commission considers desirable or necessary to promote and maintain high standards of ethical conduct in government." Therefore, if the NCOE wants to expand the Nevada Ethics in Government Law beyond its current parameters, it must go to the Legislature and ask it to draft new legislation.

There are several instances where the Nevada Supreme Court has found that an administrative agency has exceeded its authority and entered into the realm of "ad hoc" rulemaking. In Las Vegas Transit System, Inc. v. Las Vegas Strip Trolley, 105 Nev. 575 (1989) the court held that the Public Service Commission (hereinafter "PSC") exceeded its statutory authority. There, the PSC defined the words "trolley bus" or "trolley" where no definition had before existed. Thus, the PSC defined a new type of vehicle and the rules for operating such a vehicle on the Strip in Las Vegas. The court held that "the Commission engaged in ad hoc rule making by promulgating a standard of general applicability which effected policy without complying with the Nevada Administrative Procedure Act." Id. at 578. Thus, the court found that the Commission

unlawfully adopted a "regulation" as defined in NRS 233B.038.

In Coury v. Whittlesea-Bell Luxury Limousine, 102 Nev. 302 (1986), the PSC adopted a new category of limousine, namely a "stretch" limousine. When the original regulations governing the use of limousines at the airport in Las Vegas were promulgated, there was no mention of such a vehicle as a "stretch" limousine in the regulations. The PSC drafted a new definition of a "stretch" limousine, along with rules governing their use at the Las Vegas airport. The court found that this was a "regulation" as defined in NRS 233B.038, as the new regulation was a "specific grant of authority to operate a special, previously undefined *kind* of limousine." Id. at 306. This regulation set a standard of general applicability that would effectuate policy.

A case where the Nevada Supreme Court found that an agency did not engage in "ad hoc" rulemaking was State v. GNLV Corp. 108 Nev. 456, (1992). There the court found that the Nevada Gaming Commission, in enforcing the letter of the law concerning what a "wager" was, was not engaging in "ad hoc" rulemaking. There, the Golden Nugget Casino sought to deduct losses the casino suffered as a result of giving away special tokens to slot club members as losses from wagering. The Nevada Gaming Commission defined a wager as when two people both have a chance of winning or losing, as the Nevada Supreme Court had defined it in an earlier case.

The court held the "an administrative agency is not required to promulgate a regulation where regulatory action is taken to enforce or implement the necessary requirements of an existing statute." Id. at 458. Thus, because the Gaming Commission was merely clarifying what a "wager" was, it was not engaging in the prohibited "ad hoc" rulemaking.

Finally, in State, Department of Insurance v. Humana Health Insurance of Nevada, Inc., 112 Nev. 356 (1996), the Nevada Supreme Court held that the Department of Insurance did not promulgate a new "regulation" in further defining the term "home office." While the statute only listed two criteria to decide whether an insurance company's office in Nevada was a "home office" deserving of a tax credit, the Department of Insurance added several more criteria to the test. The court held that, because the Department of Insurance utilized guidelines that were clear, understandable, and well-known in the insurance industry, it did not engage in "ad hoc" rulemaking.

The instant case falls somewhere between the established boundaries of the above cases. While the NCOE was not defining a completely new term, as the PSC was in Coury and Las Vegas Transit, it was greatly expanding the known and understood parameters of the existing Nevada Ethics in the Government Law. However, this new definition was not an expected or well-understood definition like that at issue in Humana Health.

While the plain language of NRS 281.481(2) contains the phrase "any other person," which seems

like a very plain term, it had never been literally interpreted to mean "any other person" outside the sphere of family and business partners until the instant case. Thus, this new interpretation certainly expands the previous interpretation of the law, and it could easily be considered a "statement of general applicability" that "effectuates policy." It has affected and will affect the behavior of all public officials in the future. This is evidenced by the behavior of Las Vegas politicians in abstaining from votes because they were unsure of the reach of this new interpretation of the Nevada Ethics in Government Law. This has allowed votes of 1-0 and 3-0 to decide important issues in southern Nevada.

Thus, because it is not limited to the parties involved in the instant action, it could be considered a "statement of general applicability." Because it will determine how politicians will disclose and abstain in the future, it could also be considered to be "effectuating policy."

Even though the NCOE was not interpreting a brand new term, it certainly expanded the reach of the Nevada Ethics in Government Law. This decision has had severe repercussions in the political climate of Las Vegas. The implication of this new interpretation of the law is at least as far-reaching as a new definition of a trolley or a stretch limousine. Therefore, the NCOE was engaging in prohibited "ad hoc" rulemaking.

As stated in Public Service Commission v. Southwest Gas Corp., " the order is of such major policy concern and of such significance to all utilities

and consumers that it cannot be characterized as a simple adjudication in a contested case and thus outside of the statutory definition of a regulation." 99 Nev. 268, 273 (1983).

Here, this interpretation of the Nevada Ethics Law is such an expansion of the prior understanding of the ethics Law that it must be considered a regulation. The intention of the prohibition against such rule making is that the agency may not substitute its judgment for that of the legislature. 2 AmJur 2d § 152.

CONCLUSION

The Opinion of the Nevada Ethics Commission is hereby OVERTURNED. Petitioner was not given the notice required by due process to know when she would be in violation of the Nevada Ethics in Government Law. Further, the NCOE has so greatly expanded the known parameters of the Nevada Ethics in Government Law as it was previously understood that the NCOE engaged in impermissible "ad hoc" rulemaking.

It must be understood that this Court is in no manner endorsing the actions of Petitioner in making a list of concessionaires that the Clark County Commission would support. These actions disrupted and bypassed a system for choosing concessionaires that was put in place specifically to eliminate behavior like that of the Petitioner. These actions also brought the entire Clark County Commission, and public employees in general, into disrepute with the public. This was the reason that

the Nevada Ethics in Government Law was enacted in the first place.

However, even though Petitioner's actions do not rise to a level of ethical purity that the public would like to see, Petitioner did not have adequate notice to know that these actions would put her in violation of the law. Therefore, the law cannot stand as it has currently been interpreted by the NCOE.

Because this Court has invalidated the actions of the NCOE as "ad-hoc" rulemaking, and has declared the statutes in question to be unconstitutionally vague, this Court will not reach the questions of separation of powers and delegation of legislative authority.

DATED this 3rd day of September, 1999.

/s/ Jerome M. Polaha
JEROME M. POLAHA
DISTRICT JUDGE

CERTIFICATE OF SERVICE BY U.S. MAIL AND FACSIMILE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 3rd day of September, 1999, I served a copy of the foregoing document by transmitting the same via facsimile and U.S. Mail to:

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REPLY BRIEF

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NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF FOR THE PETITIONER

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Cases—Continued: **Page(s)**

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Jefferson, Thomas, *Manual of Parliamentary Practice* (N.Y., Clark & Maynard 1868) (1801) 7

Webster's New Int'l Dictionary (2d ed. 1954) 9

REPLY BRIEF FOR THE PETITIONER

At the urging of Sparks City Council Member Michael A. Carrigan, the Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that recusal provisions of the State's Ethics in Government Law are subject to strict scrutiny. The Court then granted respondent's request to hold facially overbroad a provision requiring recusal when the independent judgment of a reasonable person in the official's position would be materially affected by a relationship "substantially similar to" one of four other relationships covered by the statute (involving members of an official's household, relatives, employers, and business relationships).

We restate the holding under review at the outset because reading respondent's brief, it would be easy to forget why this case is here. Respondent touches only momentarily (Resp. 23-29[1]) on the rationale of the opinion below, which was his central thesis throughout this litigation. The bulk of his brief is instead devoted to arguing that: (1) the provision is unconstitutionally vague (*id.* at 41-49)—an issue that, as respondent conceded, B.I.O. 24, the court below declined to address, Pet. App. 6a n.4; and (2) the provision unconstitutionally burdens the right of association of officials and supporters, Resp. 29-41—a right respondent mentioned only fleetingly in his

[1] This brief follows the abbreviation conventions of the Respondent's Brief, Br. for Respondent ("Resp.") 1 n.1. Respondent's Brief in Opposition appears as "B.I.O."

opening brief below while discussing his vagueness and speech claims, see A.O.B. 9, 18, and that the court below did not address. Respondent nominally disavows (Resp. 21) the facial challenge he avidly urged below (A.O.B. 6, 15, 23), although facial arguments appear throughout his brief. Respondent's brief in opposition gave no hint that any of these matters was at issue. See B.I.O. 7-24. Respondent's eleventh-hour shift away from voting as speech after *years* of litigation reflects an awareness that his speech claim fails. To the (doubtful) extent that his newly revived claims are properly before the Court, see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, No. 09-834, slip op. 14 (Mar. 22, 2011); *Skinner* v. *Switzer*, No. 09-9000, slip op. 14 (Mar. 7, 2011), they fare no better.

Respondent faults our opening brief for focusing on speech and ignoring other "severe" burdens, such as on the First Amendment right of Vasquez's client to "engage the entire [City Council]" (Resp. 34) through the lobbyist of its choice or potential burdens on the "relationship" between "volunteers" and candidates. Respondent contends that the Lazy 8's rival hoodwinked the Commission into investigating respondent in "its self-appointed role as the police of political purity" (*id.* at 59), and that his disqualification here is part of an unprecedented effort to "take the politics out of democracy," *id.* at 1, by prohibiting officials from voting for policies favored by their political supporters. *Id.* at 52. Respondent says that the very "fabric of our democracy" (Resp. 58) is at stake.

Not so. This case involves a straightforward disqualification based on an unexceptional combina-

tion of private interests and personal and business relationships. Carlos Vasquez's interest in the casino development—the basis for recusal—was private and pecuniary, not political. His relationship with respondent did not center on shared views about the Lazy 8, nor did he appear at the Council meeting as an "activist" petitioning his government on that issue. Vasquez became involved when (with the reelection campaign already under way) the developer, who had him on a $10,000-a-month retainer, J.A. 239, directed him to win City Council approval.

Nor was Carrigan's relationship with Vasquez, a professional political consultant, see J.A. 162; C.A.V. Strategies, Ltd., http://www.cavstrategies.com/about_management.htm (last visited Apr. 14, 2011), typical of that of candidate and "perennial campaign volunteer." Resp. 9. The services Vasquez provided to respondent included managing *three* successful campaigns (including the one ongoing at the time of the Lazy 8 vote) and furnishing the services of his advertising and printing firms; indeed, 89 percent of respondent's 2006 campaign expenses were paid to Vasquez's advertising firm. Pet'r 6. Vasquez furnished those services at cost because they were "long-term friends," J.A. 230, not because of respondent's position on any issue. Whether a hypothetical law specifically requiring legislators to refrain from voting on matters involving the private interests of (current) campaign managers would pass constitutional muster (Resp. 50) is one of many diversions in respondent's brief. Under the neutral Nevada law at issue, the political context here was purely incidental: Given their close, longstanding, and continuing personal relationship, the same reasonable questions about respondent's objective

impartiality and the need for recusal would have been present if their relationship had been "forged" (Resp. 32) in real estate development.

To preserve "democracy" (Resp. 58), respondent asks this Court to invalidate a duly enacted law of an elected state legislature concerning how powers of office held under state government may be exercised. The regime he proposes would subject vast numbers of similar democratically adopted laws to exacting scrutiny, routinely making judges the final arbiters of basic questions of self-government. None of this would be an argument against enforcing an actual Free Speech right. But it supplies further confirmation, were any needed, that the answer to the question presented is the one dictated by history, logic, and precedent. The judgment should be reversed.

A. Restrictions On Official Voting Implicate No Personal First Amendment Speech Interest

In his brief discussion of legislators' claimed First Amendment right to cast legislative votes (Resp. 23-29), respondent does not contest that rules dating to the Founding are inconsistent with the notion that legislators have an individual Free Speech right to express their views by voting. Pet'r 20-21, 28-29. Nor does he refute that recusal restrictions are not limitations on speech, but on the use of official powers to effect legally binding governmental action. *Id.* at 23-24. And he does not dispute that, no less than "standard" recusal rules he declares unassailable (Resp. 39-40), this one focuses on interests and relationships and applies without regard to the content or "viewpoint" (if any) a legislator espouses.

Instead, respondent relies on a handful of lower-court opinions dating only to the late 1980s (one vacated as moot and another limited by later precedent), Resp. 25, stating that voting by a member of a public agency or board is protected by the speech guarantee of the First Amendment. *Id.* at 23. But as we explained, Pet'r 29-30 & n.9, those decisions (whose reasoning is questionable even within their narrow context) involved viewpoint-based retaliation or restrictions. Even speech lacking First Amendment protection may not be subject to viewpoint-based regulation. We know of *no* precedent during the first 198 years after the First Amendment's ratification that held that voting or expressive official action was protected speech. Nor are we aware of any constitutional challenge to a generally applicable recusal rule during that time—a remarkable silence given the widespread use of such rules and respondent's thesis that *all* such laws warrant at least "heightened" First Amendment scrutiny.

Respondent halfheartedly suggests that this Court *already decided* that legislative votes are protected speech when it held that a citizen "'expresses a view on a political matter when he signs a petition under [a state's] referendum procedure.'" Resp. 26 (quoting *Doe* v. *Reed*, 130 S. Ct. 2811, 2817 (2010)). But *Reed* held only that citizens' petition circulation, which is "core political speech," *Meyer* v. *Grant*, 486 U.S. 414, 421-422 (1988), and "a classic means of political expression," *Reed*, 130 S. Ct. at 2830 n.1 (Stevens, J., concurring in part and concurring in the judgment), did not *lose* its character simply because it could have legal effect. *Id.* at 2818. "It is one thing" to say that adding potential legal effect to a recognized form of expression "does not *deprive* it of protection, and

another thing altogether to suggest that an action * * * [that] exists only because of[] its legally operative effect as an exercise of official authority is First Amendment expression in the first place." Public Citizen Br. 7-8; cf. *Garcetti* v. *Ceballos*, 547 U.S. 410, 421-22 (2006) ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). As Justice Scalia stated in *Reed* without contradiction by the majority, "[p]laintiffs point to no precedent from this Court holding that legislating is protected by the First Amendment." 130 S. Ct. at 2833 (Scalia, J., concurring in the judgment).

The reluctance of the *Reed* majority to embrace the suggestion that a voter's signing a petition is "somewhat like" casting a legislative vote, 130 S. Ct. at 2833 (Scalia, J., concurring in the judgment), reflects basic dissimilarities: Voters are not protected by legislative immunity or absolute § 1983 immunity, and are not typically considered governmental actors, let alone policymakers. See *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 197 (2003).[2]

Lacking legal authority, respondent turns to rhetoric, proffering "tales" of legislators whose votes

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[2] Respondent's "culminating moment" theory (Resp. 24-25) would support a personal Free Speech right for an elected executive's "expressive" official action. Whether to comply with the federal court's desegregation order was "*the* issue" (*id.* at 24) in the Yonkers mayoral election, about which the winning candidate had a strong personal view. See *Spallone* v. *United States*, 493 U.S. 265, 290 n.3 (1990) (Brennan, J., dissenting).

have "express[ed] deeply held and highly unpopular views." Resp. 23-24. (Respondent hastens to add, however, that his Lazy 8 vote particularly warrants protection because it was *very popular* in his ward. *Id.* at 23.) But for all respondent's talk of the communicative value of votes, it is telling that he turns to legislators' *statements* to give them meaning. Resp. 23-24. As noted in our opening brief, Pet'r 27, the expressive content of a vote frequently "is not created by the conduct itself but by the speech that accompanies it." Cf. *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).[3]

At bottom, respondent claims that because legislative voting *could* express a personal viewpoint, legislators have a First Amendment right to vote. While John Quincy Adams's vote on the Embargo Act may have "communicat[ed] a message," Resp. 23, it does not follow that that expressive potential would give him a Free Speech interest in voting on whether to award his brother Charles a government contract, notwithstanding a neutral recusal statute. Nor does the expressive potential of a government-owned printing press give an officer a First Amendment right to use it for personal expression in the face of a

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[3] Respondent wrongly suggests that the statute, which bars disqualified officials from "vot[ing] upon or advocat[ing] the passage or failure of" a measure, Nev. Rev. Stat. § 281A.420(2) (2007), prohibits "advocacy" outside the City Council. Resp. 40. Consistent with the longstanding tradition that an official's participation cease and his "voice [is] disallowed" upon disqualification, Thomas Jefferson, *Manual of Parliamentary Practice* 44 (N.Y., Clark & Maynard 1868) (1801), the Commission has construed the statute to apply only to advocacy in official proceedings.

neutral law reserving it for official use. Although respondent complains that "talk * * * [i]s cheap" without the definitive power of a vote to back it up, Resp. 24, nothing in the First Amendment gives officials a personal entitlement to commit *public resources* to a course of action so they can prove the sincerity of their views.

B. The Recusal Provision Imposes No Material Burden On Rights Of Association And Petitioning

Respondent contends that subsection 8(c)'s "substantially similar" language imposes a "severe" burden (Resp. 36) on "the relationship between the legislator/candidate and her campaign volunteers," and on volunteers' right to petition government, Resp. 33—a burden he claims is not imposed "by any other disqualification provision in the country." *Id.* at 29. The "burdens" that attract so much of respondent's attention—and which he faults petitioner's brief for "ignor[ing]," *id.* at 39—were not "severe" enough even to warrant mention in his brief in opposition. See *Kasten*, slip op. at 14. They are chimerical in any event.

Whatever modest plausibility these arguments have depends on distorting the statute at issue and taking flight from the actual facts of this case. Section 8(e) is not, as respondent claims, "a law that explicitly target[s] an elected official's relationship with campaign volunteers." Resp. 20. Nor does it treat political loyalty "as a new-fangled sort of corruption." *Id.* at 51. Nor does it require disqualification whenever "a former campaign manager" or "volunteer[]" has an interest that comes

before the public official. *Id.* at 35. It is, rather, a neutral law that requires recusal for relationships "substantially similar" to four ongoing relationships that respondent concedes are "just like" those covered in "all the standard [recusal] statutes." *Id.* at 40. In other words, it is for "a relationship that is as close as family or as close as a business partner." Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 10 (Nev. Mar. 30, 1999).[4]

Similarly, although respondent persists in calling subsection 8(e) a "catch-all," it plainly is no such thing. A "catch-all" is "a section or provision made to embrace diverse or unclassified particulars" of any kind. *Webster's New Int'l Dictionary* 422 (2d ed. 1954). Even "catch-*some*" does not acknowledge the narrow limits inherent in tying recusal to four specific relationships. Compare *United States* v. *Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part) ("Although something of a catchall, [provision's] omnibus clause is *not* a general or collective term following a list of specific items to which a particular statutory command is applicable (*e.g.*, 'fishing rods, nets, hooks, bobbers, sinkers, and other equipment').").

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[4] *Every significant element* of the Carrigan-Vasquez relationship is absent from respondent's fanciful hypothetical about Thomas Jefferson and James Madison. See Resp. 31. Respondent offers no basis for believing the Founders would have thought a legislator's *First Amendment rights* to be implicated in the considerably different situation of voting on a matter in which a paid lobbyist, who was currently performing work for the legislator, had a special pecuniary interest.

The narrow recusal provision actually in force (as opposed to respondent's caricature of it) has not caused respondent's hypothesized cavalcade of recusals in a decade of use. Respondent cites no case in which the transient (and completed) affiliation of an ordinary campaign volunteer was deemed so close as to be tantamount to "a relationship to a family member" or a "substantial and continuing business relationship," Pet. App. 106a, and the legislative history indicates the provision would not support recusal in the case of "a[n official] and someone who had worked on her campaign." *Id.* at 69a. The small number of subsection 8(e) recusals belies respondent's fevered hypotheticals.

Respondent insists that disqualification for political relationships is a particular "theme" (Resp. 30) of the Commission's, citing a decade-old decision involving an earlier version of the statute. See Resp. 30 (citing *In re Gates*, Nos. 97-54 et al. (Nev. Comm. Ethics, Aug. 26, 1998) (*available at* http://ethics.nv.gov)). There, the Commission censured members of a county government body for promoting friends' applications for airport concessions for which they lacked relevant business experience. That decision says little about how the Commission construes current law because, as the opinion emphasized, the Legislature had not yet added the language at issue here "defin[ing] th[e] types of interpersonal interests or relationships that would trigger disclosure and abstention." If anything, the opinion shows that the political nature of *some* of those relationships was purely incidental. The opinion emphasized the "many facets of their lives" in which officials were connected to the would-be contractors, including being "best friends" and

assisting on a business matter; some had *no* political ties to the officials. While political relationships is a "theme" of respondent's brief, two cases in a *decade* (only one involving language still in force)—out of hundreds of advisory opinions on a range of relationships—hardly bespeaks an effort to create "a sterile political utopia," Resp. 18.

Also meritless is respondent's worry that recusal would be triggered when a person in a covered relationship supports official action for *policy* reasons, thereby preventing officials from "voting on an issue that is important to [their] political allies and supporters," such as legislation favored by "the NRA or NAACP." Resp. 52. The recusal provision applies only to a commitment "in a *private* capacity" to "the *interests* of others," Nev. Rev. Stat. § 281A.420(2)(c) (2007) (emphasis added), indicating that only (typically pecuniary) private interests are covered. Moreover, recusal is not required where the benefit or detriment to the interested party "is not greater than that accruing to any other member of the general business, profession, occupation or group" affected, *id.* § 281A.420(3), as is ordinarily the case when a person supports legislation for policy reasons.

Of the many hats respondent asks Vasquez to wear—"petitioner," "perennial volunteer"—"issue activist" is most ill-fitting. There is no indication that Vasquez supported respondent because of his position on the Lazy 8 or even had any view on it until its developer engaged his services and he gained a financial interest. On the contrary, it was respondent's defense that Vasquez supported his candidacy *without regard to* issue positions. A.O.B. 17.

Recusal here had nothing to do with the "responsiveness and accountability" (Resp. 53) of government officials as that is ordinarily understood—*i.e.*, that an elected representative who "'favor[s] certain policies'" would "'favor the voters and contributors who support those policies.'" Resp. 51 (quoting *Citizens United* v. *FEC*, 130 S. Ct. 876, 910 (2010)). Vasquez's private interest was utterly unlike the situation of respondent's constituents, whose support for his candidacy was likely influenced by his position on the casino, and for whom "the resulting benefit or detriment accruing" from the casino's approval was "not greater than that accruing to any other member" of the public (such that their interests would not support respondent's recusal). Nev. Rev. Stat. § 281A.420(2) (2007).

Respondent's assertion that subsection 8(e) infringes the rights of "volunteers" by forcing them to "check [their] right to petition government at the campaign door," Resp. 33, is contradicted by the facts of this case. When Vasquez appeared before the City Council, it was his *client* that was petitioning. Even if the Court were concerned about the "right" of that fourth party to petition through the advocate of its choice in this "as-applied" challenge, it would not be infringed; Vasquez could still appear. The only "burden" respondent can manufacture is to the developer's "right to engage *the entire legislature* on a vote," *id.* at 34 (emphasis added). But we know of no such "right" (it is one that a legislator's spouse, relatives, and business associates do not enjoy) and in any event, it is affected only when the volunteer has a close, *ongoing* relationship, and a distinct interest in the matter being decided. Nor does the provision "penalize[]" volunteers' involvement (*id.* at 37), any

more than recusal provisions "penalize" marriage, household formation, or being someone's employee.

On a halfway realistic view of the statute's negligible burdens, respondent's claim collapses. This statute falls far short of what this Court has held to constitute a violation of the right of association. This Court has upheld the Hatch Act's broad-ranging *direct* prohibitions on government employees' participation in political activity. *Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973). Nevada's recusal provision, like every other, regulates the exercise of official government powers (not campaigns or elections). Without any evidence from the decade the law has been in effect, respondent hypothesizes that it incidentally constrains the activities of a small number of individuals who have especially close relationships to legislators and private interests in matters before them. While respondent cites the truism that the First Amendment precludes the government from "accomplishing indirectly" what it cannot do directly, Resp. 37, this Court has never held that incidental effects as indirect and tenuous as those imagined here warrant heightened scrutiny. *E.g.*, *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 361 (1997) (upholding election regulation against association challenge, noting that statute did not "directly preclude[e] minor political parties from developing and organizing").[5]

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[5] Although respondent relies (Resp. 41) on *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986), to support application of strict scrutiny, this Court has criticized *Tashjian* for not recognizing that "strict scrutiny is appropriate

This Court traditionally has not applied even intermediate scrutiny to neutral regulations of elections, because of the deference owed the States on matters of self-government and because such regulations are unlikely to target expression. They are instead subject to review for reasonableness under the standard of *Burdick* v. *Takushi*, 504 U.S. 428 (1992). Nevada's recusal provision is a core act of self-government, see *Gregory* v. *Ashcroft*, 501 U.S. 452, 462-463 (1991), that should not be invalidated to eliminate hypothetical and trivial barriers to campaign participation.

C. Nevada's Recusal Provision Is No Outlier

Respondent claims that invalidation of the Nevada statute will have no effect on any of the myriad recusal provisions nationwide, because subsection 8(e) is "unique" and "unprecedented" (Resp. 19) in that (1) it is the only statute that includes a provision disqualifying officials based on relationships "substantially similar" to statutorily defined ones; and (2) no other state has disqualified an official because of a relationship "forged in politics." *Id.* at 20, 32. But uniformity (and breadth) would matter only if respondent had first established a severe or even substantial burden on actual First Amendment rights. Absent that, the circumstances under which local office holders may exercise their powers of public office is quintessentially a matter for

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only if the burden is severe." *Clingman* v. *Beaver*, 544 U.S. 581, 592 (2005); accord *id.* at 605 (O'Connor, J., concurring in part and concurring in the judgment). Moreover, this case involves a far more modest restriction than *Tashjian*'s blanket ban on independents voting in party primaries.

States to decide, and variation is expected and appropriate given the differing circumstances and experiences to which such laws respond. See Br. of Florida *et al.* 12. As demonstrated by the variation just among the provisions respondent and his *amici* cite, *many* statutes contain some feature that a sanctioned official could depict as "unprecedented." Resp. 20 n.2.

Respondent's categorical assertions are badly mistaken. Seattle, Washington, for example, has adopted a provision that, unlike Nevada's, *is* a "catch-all," requiring disqualification based on a number of listed relationships, or where "it could appear to a reasonable person" that the official's impartiality is impaired because of "a personal or business relationship not covered under [the provisions] above." Seattle Mun. Code § 4.16.070(1) (2011). Respondent is likewise wrong that Nevada's statute is uniquely broad; indeed, by tying the law's application to four explicit categories of relationships, it is *narrower* than many others. New Jersey, for example, broadly prohibits local officials from voting on matters in which they have "a direct or indirect financial or personal involvement that might reasonably be expected to impair [their] objectivity or independence of judgment," N.J. Stat. Ann. § 40A:9-22.5(d) (2010). Other recusal provisions are framed in similar terms.[6] State recusal statutes often

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[6] See, *e.g.*, Conn. Gen. Stat. § 8-11 (2011) (disqualifying elected and appointed zoning commissioners "directly or indirectly interested in a personal or financial sense"); N.M. Stat. Ann. § 8-8-1 (2010) (elected Public Regulation Commission members disqualified if "predispos[ed] toward a person based on

require disqualification if a matter involves the interests of an official's "business associates" without defining that potentially broad term.[7] And other States employ broadly worded common-law recusal standards. See Pet. 27-28.[8]

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a previous or ongoing relationship, including a professional, personal, familial or other intimate relationship").

[7] See, *e.g.*, Ky. Rev. Stat. § 6.761(1) (2010) (prohibiting legislator from participating on any matter in which a "business associate" will have direct monetary gain or loss); *City-Cnty. Planning Comm'n* v. *Jackson*, 610 S.W.2d 930, 932 (Ky. Ct. App. 1980) (construing Ky. Rev. Stat. § 100.171(1) to prevent "direct and indirect" benefits to appointed official's "business associates"); 4 Pa. Cons. Stat. § 1202.1(c)(3) (2010) (requiring recusal of appointed official where "objectivity, impartiality, integrity or independence of judgment may be reasonably questioned due to the member's relationship or association with a party connected to any hearing or proceeding or a person appearing before the board"); Vt. Stat. Ann. tit. 24, § 1984(b) (2010) ("business associate").

[8] Respondent is likewise mistaken that no "ethics authority has interpreted a disqualification provision to reach [a political] relationship." Resp. 20 (emphasis omitted). Relationships that are otherwise covered by generally applicable recusal requirements are not exempted because they involve politics. New Jersey law, for example, prohibits local officials from voting on a matter that benefits a "close friend in a non-financial way," *Haggerty* v. *Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1101 (N.J. Super. Ct. App. Div. 2006) (quoting *Wyzykowski* v. *Rizas*, 626 A.2d 406, 414 (N.J. 1993)). That has been applied to disqualify an official because of close friendship and "political allegiance." *Ward* v. *Zoning Bd. of Adjustment*, No. BER-L-5354-08, 2009 WL 1498705 (N.J. Super. Ct. Law Div. May 15, 2009).

D. Nevada's Recusal Provision Is Not Vague, Much Less Unconstitutionally Vague

Respondent does not dispute that the four express bases for recusal provided by Nevada law, Nev. Rev. Stat. § 281A.420(8)(a)-(d) (2007), for members of the officer's household, relatives, employers, and substantial and continuing business relationships, are clear and widely used. See Resp 20 n.2, 40. But respondent contends that the provision requiring recusal for relationships "substantially similar" to those "four very specific and concrete" relationships (Pet. App. 77a) is somehow "so hopelessly vague that people of 'common intelligence must necessarily guess at its meaning.'" *Id.* at 42 (quoting *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

This Court has long held that such language helps resolve (not exacerbate) vagueness problems: Under the canon of *ejusdem generis*, general terms at the end of a list are "construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words." *Wash. Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 383 (2003) (emphasis added). Congress and state legislatures have routinely used the phrase "substantially similar" in many contexts, including criminal prohibitions,[9] and respondent fails to cite a

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[9] See Pet'r 54 n.14; Ind. Code § 6-1.1-20-3.6(g)(2) (2010) (providing that after referendum fails, "a substantially similar project" cannot be put to public vote for one year); 705 Ill. Comp. Stat. 405/2-13.1(1)(b)(ii)(E) (2010) (eliminating duty to reunite minor with parent convicted of offense that is "similar and bear[s] substantial relationship to" specified offenses); Kan. Stat. Ann. § 21-36a16 (2011) (unlawful to facilitate commission

single case holding that common phrase unconstitutionally vague. Indeed, courts of appeals have "unanimously" rejected vagueness challenges to the federal Analogue Act, *United States* v. *Turcotte*, 405 F.3d 515, 531 (7th Cir. 2005), which imposes criminal penalties on transactions in substances whose chemical structure is "substantially similar to" scheduled controlled substances, 21 U.S.C. § 802(32)(A) (2006). "[P]erfect clarity" has "never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989). This Court has rejected vagueness challenges to language less specific than this. *E.g.*, *Letter Carriers*, 413 U.S. at 568 (prohibition on taking "active part in political management"); *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972) (prohibition on congregating "with intent to cause public inconvenience, annoyance or alarm," and refusing to comply with order to disperse).

Respondent's efforts to minimize the statutory advisory opinion mechanism are unconvincing. This Court has held such provisions centrally important to constitutional vagueness analysis. *E.g.*, *Letter Carriers*, 413 U.S. at 580. While respondent asserts that a process that *could* take up to 45 days is "not much of an option in the heat of a legislative battle," Resp. 47, he does not explain why it was inadequate here, given his "admi[ssion] he had six months lead time before the Lazy 8 application came to a vote," Pet. App. 37a n.7, and given the Commission's practice of providing informal guidance on a few days'

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of enumerated drug offenses "or any substantially similar offense from another jurisdiction").

notice. Respondent's claim that the mechanism is unacceptable because it is unavailable to an "aspirant to office or prospective volunteer" (Resp. 47) is irrelevant because the recusal law does not impose penalties on them (much less the "criminal sanctions" at issue in the sole case respondent cites, see *ibid.* (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 40 n.47 (1976)). Every person subject to the Commission's (civil) jurisdiction is entitled to invoke the mechanism.

Respondent next points to (1) the divergence between the City Attorney's interpretation and the Commission's and (2) claimed inconsistencies among the "tentative" conclusions of the Commission members. Resp. 43-44. But the City Attorney's analysis was facially deficient: It unequivocally stated that "[t]he *only* type of bias which may lead to disqualification * * * must be grounded in facts demonstrating that *the public official* stands to reap either financial or personal gain or loss as a result of official action," J.A. 91-92 (emphasis added). It *completely failed* to analyze the provision at issue here involving commitments in a private capacity to the interests of others. See J.A. 87 n.1; 260-61 (noting omission).

Although respondent claims the Commissioners could not agree on a basis for respondent's disqualification and so "declined to pick one," Resp. 14 (citing Pet. App. 105a), on the opinion's *next page*, the Commission unanimously concluded that Carrigan was disqualified because of his "close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" Pet. App. 106a. Respondent can maintain that the Commissioners' views were

"disparate and tentative" (Resp. 44) only by citing the initial statements of individual Commissioners when first discussing the matter immediately after the close of testimony at Carrigan's hearing. See J.A. 243. But if disagreement among *jurists* is not enough to establish even "ambiguity," see *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995), the differences respondent cites (real and imagined) cannot render a statute unconstitutionally vague. See *United States* v. *Jackson*, 968 F.2d 158, 163 (2d Cir. 1992).

No ill-advised vagueness argument would be complete without a claim of arbitrary enforcement, and respondent does not disappoint. But respondent's effort to cast himself as the victim of arbitrary enforcement by the Commission (Resp. 48-49) is pure fantasy. During the debate over subsection 8(e), the Legislature discussed a hypothetical case eerily similar to this one, contrasting an officer's relationship with a one-time campaign volunteer, which would not be covered, with a "person [who] ran your campaign time, after time, after time," which would be. Pet. App. 69a (quoting Hearing on S.B. 478, at 42). Respondent's offhand claim of "discriminatory application" (Resp. 49) is not credible absent some indication that the bipartisan Commission has failed to censure someone similarly situated; but the Commission sanctioned a Lazy 8 opponent for his vote during the same meeting because of an undisclosed business relationship with the Nugget (which the Lazy 8's developer brought to its attention). Pet'r 9-10 n.4. And the Commission's processes, which include a preliminary investigation to ensure charges are well founded, public hearings with live testimony, public deliberations, and written opinions that are subject to judicial review, are

worlds apart from the "arbitrary enforcement" that concerned the Court in cases like *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983).

Finally, respondent's claim that subsection 8(e) "allowed the Nugget to co-opt an ethics agency to override losses fairly sustained in the political process," Resp. 18, again disregards the facts. Even with Carrigan's vote, his side *lost* the City Council vote. The Lazy 8's developer "overr[o]de" that loss through litigation—the Council's prompt "settlement" of a lawsuit brought immediately after that unsuccessful vote.

E. Heightened Scrutiny Would Impose Unwarranted Burdens

Respondent dismisses as "overwrought" (Resp. 19) concerns raised about recognizing an unprecedented (and unsupported) right, claiming that most recusal provisions will trigger only heightened scrutiny, which he assures they will "easily survive." *Id.* at 40. Respondent articulates no First Amendment basis for treating burdens imposed on one set of relationships differently from "substantially similar" ones (his previous rationale, that legislative voting is "core" political speech, Resp. 32, would support the same level of scrutiny for recusal from a vote on "*the* issue" (*id.* at 24) based on a spouse's employment). But that is only one reason among many why respondent's argument is indeed breathtaking. Respondent acknowledges that his theory would subject *every* legislative recusal law in the country to rigorous First Amendment review. *Id.* at 17. Indeed, if expressive exercise of governmental power is entitled to protection, there is no principled basis for

distinguishing between actions of legislators and elected members of other branches, who likewise arrive in office as the culmination of "protected activities." *Id.* at 25.

That such laws would be subject to "only" intermediate scrutiny and likely would survive (if true) is little comfort. That such challenges can be easily brought is itself a serious concern: "Claims that have little chance of success are nonetheless frequently filed." *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting). Even if such provisions are ordinarily upheld, routine judicial intervention in state self-regulatory processes is "inconsistent with sound principles of federalism and separation of powers." *Garcetti*, 547 U.S. at 423. That is to say nothing of the costs for the system: "[P]redictions that the government is likely to *prevail* in the balance" "do[] not avoid the judicial need to *undertake the balance* in the first place." *Id.* at 449 (Breyer, J., dissenting).

But intermediate scrutiny is not the cakewalk respondent suggests. For routine cases, governments will be haled into court to "demonstrat[e] that the recited harms are real, not merely conjectural," that "the regulation will in fact alleviate those harms in a direct and material way," and that the regulation does not "'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 664-665 (1994) (plurality opinion) (quoting *Ward*, 491 U.S. at 799). There is no reason to believe sanctioned officials would accept that it is "necessary," for example, for a recusal provision to extend to the third degree of consanguinity, not just the second, or to

require recusal and not just disclosure (or vice-versa). See *id.* at 668 (despite three-year legislative record, remanding to "develop a more thorough factual record" necessary to apply intermediate scrutiny). Indeed, a sanctioned official could claim a law was *under*inclusive (see Resp. 55-56) for compelling recusal where an adult sibling's or brother-in-law's interests are at issue, but not where (as here) the official's personal and financial relationship is closer but the third party is a nonrelative.

Finally, although respondent notes that this Court has upheld disclosure requirements in other contexts (Resp. 57-58), he fails to address the reasons (Pet'r 56-58) why disclosure alone is inadequate to serve Nevada's interests. Even under intermediate scrutiny, there is no "least restrictive alternative" requirement and courts may not second-guess the legislature about "'how much protection [of the government interest] is wise.'" *Ward*, 491 U.S. at 798 (quoting *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984)). There can be little question that disclosure alone would serve Nevada's interests "less well" than recusal, and thus is not constitutionally compelled. *Id.* at 800. Under respondent's view, the proponent of a popular project could engage in brazen self-dealing (say, by voting on a measure benefitting his spouse) without consequence, so long as the voters, whether because they agree with the vote or for lack of effective opposition, do not turn him out of office at the next election. This Court has never suggested that the ballot box is the sole constitutional means of ensuring that public offices are "held for the sole benefit of the people." Nev. Rev. Stat. § 281A.020(1)(a).

CONCLUSION

For the reasons set forth herein and in our opening brief, the judgment should be reversed.

Respectfully submitted.

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APRIL 2011

SUPPLEMENTAL BRIEF

No. 10-568

In the
Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

SUPPLEMENTAL BRIEF IN OPPOSITION

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December 10, 2010

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QUESTION PRESENTED

Whether state-imposed restrictions on the ability of local elected officials to vote on legislative matters are subject to strict scrutiny review under the First Amendment.

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, Sparks City Councilman Michael A. Carrigan respectfully submits this Supplemental Brief in Opposition to the Petition for Writ of Certiorari to bring the Court's attention to intervening circumstances that had not occurred at the time of Carrigan's last filing. The Brief in Opposition filed by Carrigan on November 29, 2010 argues that the matter now before the Court does not present an "ideal vehicle" to resolve the issue presented for review based on the pendency of a second, similar appeal before the Nevada Supreme Court (Docket No. 56462). *See* Opp. 24-25. On December 9, 2010, the Nevada Supreme Court dismissed that appeal as moot. *See* App. 1a-3a.

Nevertheless, the dismissal of the second appeal does not cure the constitutional infirmities of the Nevada Ethics in Government Law that remain unreached by the Nevada Supreme Court.[1] Therefore, a determination by the Court that a standard of review other than strict scrutiny applies to state-imposed restrictions on the political speech of elected officials does not guarantee a different result in the instant case and may not prevent the ultimate demise of Nev.Rev.Stat. § 281A.420(8) (2007) on other constitutional grounds.

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[1] Namely that Nev.Rev.Stat. § 281A.420(8) (2007) is unconstitutionally vague, and that the binding advisory opinion process established in Nev.Rev.Stat. § 281A.440 (2007) is an unconstitutional prior restraint on protected speech.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 56462

[Filed December 9, 2010]

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, Appellant/Cross-Respondent, vs. MICHAEL A. CARRIGAN, FOURTH WARD CITY COUNCIL MEMBER, OF THE CITY OF SPARKS, Respondent/Cross-Appellant.

ORDER DISMISSING APPEAL AND CROSS-APPEAL

This is an appeal and cross-appeal from a district court order granting a petition for judicial review of an Ethics Commission decision. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge

When our preliminary review of the docketing statement and the NRAP 3(g) documents revealed potential justiciability and jurisdictional defects, we ordered appellant and cross-appellant to show cause why this appeal and cross-appeal should not be dismissed. First, according to the documents before us,

it appeared that the City Council voting to which the Ethics Commission decision pertained has concluded, with cross-appellant having abstained and, thus, that this appeal was moot. See NCAA v. University of Nevada, 97 Nev. 56, 624 P.2d 10 (1981) (pointing out that this court's duty is to decide actual controversies, not to give opinions on moot questions). Second, cross-appellant prevailed below, and as a result, it appeared that cross-appellant was not an aggrieved party with standing to appeal. See NRAP 3A(a); Ford v. Showboat Operating Co., 110 Nev. 752, 877 P.2d 546 (1994); Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 874 P.2d 729 (1994).

In response, cross-appellant moved to voluntarily dismiss his cross-appeal, and he also filed a document signed by appellant agreeing to the dismissal. Accordingly, we grant the unopposed motion to voluntarily dismiss the cross-appeal. NRAP 42(b).

Appellant, in its timely response, argues that the appeal is not moot because a legal question involving the constitutionality of its application of the ethics laws remains pending. Appellant also argues that even if the appeal is moot, the issues it raises are capable of repetition, yet evading review, and thus fall within an exception to the mootness doctrine. Having considered appellant's response, we conclude that this appeal is moot. Further, the capable of repetition yet evading review exception is not applicable here. Traffic Control Servs. v. United Rentals, 120 Nev. 168, 171-72, 87 P.3d 1054, 1057 (2004) (recognizing that the capable of repetition yet evading review exception to the mootness doctrine applies when the duration of the challenged action is "relatively short," and there is a "likelihood that a similar issue will arise in the future"

(citing, among other opinions, Langston v. State, Dep't of Mtr. Vehicles, 110 Nev. 342, 344, 871 P.2d 362, 363 (1994) (pointing out that facts unique to a particular party will not give rise to the mootness exception)). Accordingly, we

ORDER this appeal and cross-appeal DISMISSED.

/s/Cherry, J.
Cherry

/s/Saitta, J.
Saitta

/s/Gibbons, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Yvonne M. Nevarez-Goodson
Sparks City Attorney
Washoe District Court Clerk
Stephanie Koetting, Court Reporter

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 10-568

In the Supreme Court of the United States

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF FLORIDA, ALABAMA, ARIZONA, COLORADO, HAWAII, IDAHO, INDIANA, LOUISIANA, MAINE, MICHIGAN, MONTANA, PENNSYLVANIA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the State's Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The question presented is: Whether the Nevada Supreme Court erred by applying strict scrutiny to the State's content- and viewpoint-neutral recusal rule.

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STATEMENT OF AMICI INTEREST

The Amici States have an interest in this case because the question of the appropriate judicial standard for laws regulating voting conflicts of state and local officials implicates core issues of federalism. Structuring a government and regulating its officials is a matter necessarily entrusted to the respective sovereign. Each State has a provision regulating a public official's conduct when the official has a conflict of interest; most require recusal in at least some circumstances. The diversity of these laws owes simply to each State's unique and indigenous circumstances. Though the particulars may vary, however, conflict provisions are consistently employed by the States as a means to halt corruption in their governments.

The Amici States are concerned at the prospect of each state recusal law being scrutinized through the harsh prism of strict scrutiny. Strict scrutiny unnecessarily complicates the States' ability to fashion legislation that is responsive to its particular circumstances. At an irreducible minimum, the strict scrutiny standard ensures that public officials who find themselves subject to recusal laws can raise a legal challenge under a standard of review that will place great burdens on the defending State.

A strict scrutiny standard raises a host of additional concerns. Beyond the certain prospect of increased litigation and its attendant consequences, a strict scrutiny standard would necessarily drive States toward a uniform national recusal standard.

States should be permitted the greatest possible leeway to structure ethics laws that implicate when, and if, their own public officials should be prohibited from voting on a particular matter. States' authority to structure and regulate their governments through their ethics rules is at the heart of our federalist system. Amici States urge that respect for their sovereign interests militates strongly in favor of reversal and the establishment of a more deferential standard of review.

SUMMARY OF ARGUMENT

The Nevada Supreme Court's application of a strict scrutiny standard in reviewing the constitutionality of a state law regulating voting recusals by elected officials is misguided. This standard threatens the validity of recusal statutes across the nation, encroaches on core federalism concerns, and makes more difficult the work of state legislatures in creating workable ethical standards for their respective jurisdictions.

First, every State has adopted conflict of interest provisions that apply when a legislator has a personal interest in an issue. The details of these provisions may vary across jurisdictions, but the uniformity of their presence reflects a unified commitment to ensuring that "no man may serve two masters." *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 549 (1961). States have a great sovereign interest in promoting good governance within their jurisdictions. The scope of these laws reflects the vitality of federalism in allowing each State broad discretion to form its own determination of what parameters should apply.

This discretion is consistent with traditional principles of federalism, including the concept that state legislatures are the institutions best situated to deal with local domestic policy concerns. Strict scrutiny denies States the flexibility to craft legislation that is responsive to their individualized circumstances. The inevitable result of strict scrutiny review will be to unravel the status quo (which appears to be working just fine) and impose a far

more restrictive approach that squelches flexibility and leads to a one-size-fits-all standard.

Second, strict scrutiny is inappropriate because it will prove unduly burdensome moving forward. States will face a Sisyphean task when defending their ethics laws against constitutional challenges. The strict scrutiny standard will encourage perpetual legal challenges in federal courts. Nothing speaks more directly to the social contract between a State and its citizens than its ethics laws regulating the conduct of public officials. A strict scrutiny test would unduly hamper this important relationship and impede the democratic process by second-guessing and undermining the role of the state legislatures in developing solutions to ethics issues. For these reasons, the Nevada Supreme Court's decision should be reversed.

ARGUMENT

I. State laws governing voting conflicts properly are left to the States' sovereign authority and require flexibility to address States' individual circumstances.

Every State has a statute or rule addressing the procedures by which public officials must abide when conflicts of interest arise; these laws are varied and involve differing details due to the diverse circumstances of each State. Yet those diverse circumstances evolved from the same common law principle: "no man can be a judge in his own case." *In re Murchison*, 349 U.S. 133, 136 (1955). The application and regulation of that principle to a State's public officials are matters entirely within the State's sovereign authority. Subjecting recusal laws to strict scrutiny, as the Nevada Supreme Court did below, unreasonably restricts the States' sovereign rule-making authority, opens the litigation floodgates, and denies States the flexibility needed to contour their conflict of interest provisions to meet their individual circumstances.

A. Too strict a standard interferes with the States' significant sovereign interests and short-circuits the democratic process by which recusal laws are adopted.

The imposition of too strict a standard of judicial review undermines the democratic process by which States enact recusal provisions. Recusal laws serve a purpose critical to a State's success by

preventing officials from voting on matters where their impartiality is called into question. These laws assist in protecting States from corruption by ensuring that representatives are not influenced by the inducement of potential financial gain.

Thomas Jefferson noted that recusal laws play an integral role in the preservation of democratic governance:

> Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice has been disallowed, even after division. In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the House that this rule of immemorial observance should be strictly adhered to.

See Tex. Const. art. III, § 22, Interpretive Commentary (2007) (quoting II, *The Writings of Thomas Jefferson* 368 (Library ed. 1903)). The States' modern day codes evolved from this common law tradition going back to before the founding of our nation.

As an example, prior to Florida's codification of its ethics rules, the Florida Supreme Court established that public officials should not participate in matters where they have an interest in a personal gain or loss. *See Stubbs v. Fla. State Fin. Co.*, 1[illegible] So. 527, 528 (Fla. 1935). The court explained

that "[t]his principle has many times been recognized by this court and is not only founded upon a wholesome public policy, but is undergirded by the familiar scriptural quotation attributed to One 'who spoke as never man spake,' to the effect that 'no man can serve two masters.' " *Id.* (citing *Lainhart v. Burr*, 38 So. 711 (Fla. 1905); *State v. Gautier*, 146 So. 562 (Fla. 1933)). That same year, the court reiterated:

> No principle of law is better settled than that the same person cannot act for himself and at the same time with respect to the same matter as the agent of another whose interests are conflicting. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle.

City of Coral Gables v. Coral Gables, Inc., 160 So. 476, 479 (Fla. 1935). The current codification of the State's ethics rules developed during the mid- to late-1960s. *See, e.g.*, Nineteenth Statewide Grand Jury First Interim Report, *A Study of Public Corruption in Florida and Recommended Solutions*, No. SC09-1910, at 7 (Dec. 17, 2010), *available at* http://myfloridalegal.com/webfiles.nsf/WF/MRAY8CTPTV/$file/19th1stInterimReport.pdf (last visited Feb. 26, 2011) [hereinafter Grand Jury Report]. States require flexibility — which strict scrutiny will eviscerate — to amend their codes to changing instances and understandings of corruption, resulting in standards "more precise" than their common law lineage. Pet'r Br. 22.

Conflict provisions within state ethics codes are a key element in how the States structure and regulate their governments, and therefore are entitled to substantial deference. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (recognizing "the authority of the people of the States to determine the qualifications of their most important government officials"); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference."). These provisions operate in a sphere uniquely suited to state governance; States must deal directly with the consequences of unscrupulous public officials and the decline of public confidence in government. *See Gregory*, 501 U.S. at 463 (decisions as to the parameters of these officials' powers lie at "the heart of representative government") (citation and quotation marks omitted). Recusal and conflict of interest provisions therefore are "beyond an area traditionally regulated by the States; [they are] decision[s] of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460; *see also Ex Parte Curtis*, 106 U.S. 371, 373 (1882) (noting that it "is within the just scope of legislative power" to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service").

Absent the presence of a core constitutional right historically deserving of strict scrutiny, courts should defer to state legislatures; they are often

closest to the problems at issue and are the institutions best able to reflect what a particular "community desires"[1] from its government. *See generally Tyson & Bro. United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J. dissenting) ("I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."). The merit of these recusal laws should be determined by the ordinary democratic process; the adoption of too strict a judicial review standard would unnecessarily force States to overcome significant hurdles to protect the constitutionality of their provisions. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) (observing that, in the First Amendment context, "rarely" will a litigant be able to overcome strict scrutiny).

Nevada's legislators, by codifying section 281A.420(2)(c), have passed a comprehensive recusal law that delineates when the State's public officials can, and cannot, vote on matters that might impinge

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[1] *See Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J. dissenting) ("There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.").

on their impartiality. Under fundamental democratic principles, the process by which the elected state representatives in Nevada decided this standard was necessary is deserving of the greatest judicial deference.

The strict scrutiny standard should be rejected in favor of a more reasonable and deferential standard that accounts for the realities of lawmaking on this topic. Strict scrutiny fails to accord due deference to the reasoning underlying recusal provisions, and it potentially short-circuits the democratic process by usurping the legislature's role, "constrain[ing States'] ability to adopt and enforce basic rules for self-government." Pet'r Br. 18. Applying an unnecessarily strict degree of scrutiny will inevitably impede the States' abilities to craft useful legislation on the critical issue of ethics and public officials.

B. State conflict of interest provisions reflect the diverse and independent circumstances of the States and are consistent with federalism principles.

As noted above, all States have some mechanism to address conflicts of interest on the part of their officials at the state and local levels. The majority of States have enacted legislation or adopted a rule that requires absolute abstention from voting by state legislators in certain circumstances. Those provisions prohibit an official from taking any action on a matter in which he or she has a conflict, most often due to a pecuniary

interest. *See* Office of Legis. Research, Conn. Gen. Assemb., 2000-R-0155, *Voting Restrictions in State Ethics Codes* (Feb. 2000), *available at* http://www.cga.ct.gov/2000/rpt/2000-R-0155.htm (last visited Feb. 26, 2011). And most States have an ethics commission providing independent enforcement of these ethics codes.[2]

While conflict and recusal provisions have developed in response to uniform demands for strengthened ethics in government, their particular requirements are not uniform; nor should they be. In New Jersey, for instance, the circumstances for abstention are numerous: "No member of the Legislature shall participate by voting or any other action, on the floor of the General Assembly or the Senate, or in committee or elsewhere, in the enactment or defeat of legislation in which he has a personal interest," meaning a direct monetary gain or loss for the legislator or a member of his family. N.J. Stat. Ann. § 52:13D-18. Alabama's conflict of interest law is equally wide-reaching: a legislator cannot vote on *any* legislation "*in which he or she knows or should have known* that he or she has a conflict of interest." Ala. Code § 36-25-5(b) (emphasis added).

In Alaska, legislators need only refrain from voting in circumstances when the legislator has

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[2] Forty-one States have ethics commissions. Nat'l Conference of State Legislatures, *Ethics, State Ethics Commissions*, http://www.ncsl.org/?TabId=15331 (last visited Feb. 20, 2011).

> an equity or ownership interest in a business investment, real property, lease, or other enterprise, if the interest is substantial and the effect on that interest of the action to be voted on is greater than the effect on a substantial class of persons to which the legislator belongs as a member of a profession, occupation, industry, or region.

Alaska Stat. § 24.60.030(g). Similarly, in Wyoming, a legislator is only prohibited from voting on matters that present *clear cases* of a personal or private interest. Wyo. Stat. Ann. § 9-13-106.

These types of differing ethical standards could be explained by any number of factors, such as the degree of corruption or scandal within state government,[3] whether term limits are imposed on state legislators,[4] or even differences in population.[5] States need broad leeway to craft ethical standards in this critical area of regulation to adapt to

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[3] It is not surprising that much of the codification of these ethics rules developed during the mid- to late-1960s, at a time when public confidence and trust in government was declining. *See, e.g.*, Grand Jury Report, *supra* p.7, at 7.

[4] Me. Rev Stat. tit. 1, § 1011 ("Membership in the Legislature is not a full-time occupation and is not compensated on that basis; moreover, it is measured in 2-year terms, requiring each member to recognize and contemplate that his election will not provide him with any career tenure.")

[5] *See generally* Mark Davies, *Governmental Ethics Laws. Myths and Mythos*, 40 N Y.L. Sch. L. Rev 177, 180 (1995) (explaining that an ethics provision that is good for a largely populated area may devastate a small municipality)

changing circumstances. In Florida, for instance, a recent Statewide Grand Jury Report recommended that willful violations of the State's conflict of interest provisions be subject to criminal penalties, similar to Kentucky Revised Statute section 6.761. Grand Jury Report, *supra* p.7, at 45-47. The Report notes that this would give needed "teeth" to the decidedly sovereign interest that officials "work in the interest of the public first and foremost." *Id.* at 42. The process by which each state legislature determines what standard best applies in its jurisdiction deserves substantial latitude to ensure that ethical standards have vitality and relevance.

II. Strict scrutiny of state voting conflict laws invites a litany of problems including unduly burdensome litigation.

States, as well as local governments, have adopted a range of conflict recusal provisions for the laudable purposes of decreasing corruption and increasing public confidence in elected officials. Strict scrutiny review risks invalidating a wide swath of statutes critical to the States' sovereign authority to structure and regulate their governments. The ethical standards adopted to deal with voting conflicts deserve deference as well as protection from unwarranted federal court litigation.

A. Strict scrutiny will encourage vexatious federal court litigation.

Justice Pickering warned below that the application of strict scrutiny to Nevada's recusal provision "opens the door to much litigation and little

good." *Carrigan v. Comm'n on Ethics*, 236 P.3d 616, 632 (Nev. 2010) (Pickering, J., dissenting). A decision affirming the majority of the Nevada Supreme Court would invite, and, indeed, encourage lawsuits by public officials. Moreover, the strictest standard would force States to act prospectively (like any litigant would) to minimize their potential for incurring losses, financial or otherwise.

Public officials who fall within the prohibitions of a recusal law would be well-served to mount an aggressive legal challenge with the hope that a strict scrutiny standard may benefit even a blameworthy legislator. The more egregious the action or apparent the violation — and thus the more certain a conviction and penalty — the more worthwhile a constitutional challenge might be.

States may also find themselves subjected to section 1983 actions by public officials who are charged with recusal violations, thereby creating still more costly litigation and subjecting States to potential damages. *See Rangra v. Brown*, 566 F.3d 515, 518 (5th Cir. 2009) (city council members brought section 1983 action challenging the Texas open meetings provisions they had been investigated for violating), *reh'g en banc dismissed as moot*, 584 F.3d 206 (5th Cir. 2009); *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 528 (1st Cir. 1989) (officials brought section 1983 actions for First Amendment violations resulting from town prohibiting their participation).

The viability of state recusal laws is dramatically reduced if these laws are subject to the

most stringent and intrusive standard of review in the judicial toolbox. Facing the threat of presumptive unconstitutionality, legislatures may either jettison their attempts to enact creative and effective solutions to the persistent threat of corruption or gravitate to ones whose effectiveness is questionable because they are so minimal and noncontroversial. Adherence to a one-size-fits-all mentality is ill-suited for decisions by individual sovereigns that are "the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Increased litigation would serve no worthwhile purpose other than to impede traditional notions of federalism. Litigation costs and the expenditure of resources needed to defend these suits would place already-beleaguered governmental budgets under greater financial strain. States may be driven to avoid costly federal court litigation and adopt "safer" and less effective recusal provisions, which would yield little success in halting corruption.

B. States defending their ethics laws will face significant burdens under a strict scrutiny standard.

This Court has "readily acknowledge[d] that a law rarely survives [strict] scrutiny." *Burson v. Freeman*, 504 U.S. 191, 200 (1992); *see also Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984) ("Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact. Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model*

for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).").

States protecting their ethics codes and confronting strict scrutiny review face many hurdles. They must show that a compelling governmental interest supports the provision challenged and that the provision is narrowly tailored to reach that interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (strict scrutiny test requires that "regulation is necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end"). States will carry an evidentiary burden to overcome the presumption that their provisions are unconstitutional. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). When a statute is deemed to encroach on a protected area of speech, courts are wary and demand exacting and supportive justification. *See, e.g., Landmark Commc'ns v. Virginia*, 435 U.S. 829, 841 (1978).

To survive strict scrutiny, the State must bring forth proof that would include "extensive legislative hearings," as well as "witnesses who can testify as to what would happen without" the challenged provisions and the "exact effect of these laws" on their intended targets. *Burson*, 504 U.S. at 208. This Court has noted that strict scrutiny "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). States would face an

onerous, expensive, and time-consuming task in developing an evidentiary record compelling enough to overcome strict scrutiny.

C. Undesirable consequences will occur under a First Amendment strict scrutiny standard.

A study examining federal cases (from 1990 to 2003) involving the application of strict scrutiny concluded that the "fatal in fact" adage is somewhat inaccurate, noting that thirty percent of challenged provisions survived heightened review. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 796 (2006). Of all the categories examined, however, strict scrutiny was most fatal in free speech cases where only twenty-two percent of statutes survive. *Id.* at 815. Particularly relevant here is the rate at which state and local regulations survive. State legislative enactments were upheld only twenty-three percent of the time; local government enactments had only a fifteen percent success rate. *Id.* at 818. As the study noted, local governments "face a scrutiny that is nearly always fatal." *Id.* at 819; *see also id.* at 821 ("One of the most striking and powerful patterns in the strict scrutiny data is how federal governmental actors fare compared to state and local governmental actors. Federal actors, such as Congress, the federal judiciary, and federal agencies are much more likely to have their laws upheld than state and local governmental actors.").

States, which serve as laboratories of democracy, are often the entities counted on to act and react to pressing societal needs. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Given the significant sovereign interests at issue, States should be permitted to respond to their electorates and act in a manner they believe is most consistent with their institutional values. States are incubators for political experimentation; nothing speaks more directly to the social contract between States and their citizens than ethics laws regulating the conduct of public officials.

Simply put, a strict standard under the First Amendment will drive States towards ineffectual uniformity, an undesirable result given the persistent problem of corrupt state and local officials. *See Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("In short, it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down."). Indeed, "constitutionally imposed uniformity [is] inimical to traditional notions of federalism." *Rummel v. Estelle*, 445 U.S. 263, 282 (1980); *see also Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) ("Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system."). Certain areas of the law are particularly well-suited to the central precept of the federal system, i.e., that federal courts should only intrude in matters of state government for the clearest of constitutional violations. Where the federal interests are more opaque, as they are here, courts should

defer to state legislatures' expertise. Public officials subject to recusal provisions are often elected by and serve directly the people in their respective States and localities, and it is these constituents who must deal with the consequences of lax regulation of their public officials.

An implication of the Nevada Supreme Court's holding is that elected officials have an all but unfettered First Amendment right to vote on any matter, despite a neutral regulation to the contrary. A nondiscriminatory ethics regulation on voting conflicts should not be held subject to the same standard of scrutiny as discriminatory prohibitions on core free speech rights. *See generally Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable."). Strict scrutiny should not tie the hands of States seeking to assure that their officials' voting is done fairly and ethically. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

***

In short, respect for state governments is lost where laws regulating voting conflicts of public

officials must first run the litigation gauntlet of strict scrutiny; recusal provisions will be presumptively unconstitutional, permitting public corruption to survive and public confidence to further erode. Instead, States are best able to identify and address their own institutional problems in this context, and should be afforded the necessary freedom to craft appropriate remedies and structure their own governments.

CONCLUSION

For all of the above reasons, this Court should reverse the decision of the Nevada Supreme Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-568

In the Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE*

The International Municipal Lawyers Association (IMLA) is a nonprofit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts. There are over 39,000 local government entities in the United States comprised of counties, municipalities, towns and townships.[1] Each of these local government entities have multiple public officials who are subject to some form of ethics or conflict of interest regulations. IMLA's members are intimately involved in advising local government officials

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* The parties' consent to amicus briefing is on file with the Clerk of this Court. In accordance with SUP. CT. R. 37.6, amici states that no counsel for either party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[1] *See* U.S. Census Bureau, Governments Division, 2007 Census of Governments, *Local Governments and Public School Systems by Type and State: 2007* (2009), *available at* http://www.census.gov/govs/cog/GovOrgTab03ss.html.

relative to the application of these conflict of interest statutes and ethics codes. Because of this unique expertise, IMLA submits this brief to assist the Court with an understanding of the challenges faced by local government attorneys and local government officials when faced with vague ethical statutes.

IMLA has an immediate interest in the outcome of the present case as vague statutory language such as that found in Nevada Revised Statutes § 281A.420 (2007)[2] presents obstacles to advising local government officials as to the proper course of action. When a law is unclear and there is little or no case law or legislative history to serve as guidance, a local government attorney is left to speculate as to the meaning of the provision.

STATEMENT OF THE CASE

IMLA adopts the statement of the case set forth in the Brief for Respondent.

SUMMARY OF ARGUMENT

Since the beginning of this nation, there has been a need for legislatures to enact recusal statutes. These statutes ensure that elected officials abstain from voting on matters in which their personal loyalties interfere with their oath of office and obligation to the citizens they represent. Recusal statutes do not only affect local elected officials, such as Councilman Carrigan here, the statutes also

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[2] All citations to the Nevada Revised Statute are to the 2007 version, consistent with the opinions below and the Petitioner's Brief and the Respondent's Brief.

affect state legislators and citizens the elected officials represent. However, when recusal statutes are vague to the point that they pose a trap for the wary as well as the unwary, it frustrates the statute's purpose and no one benefits.

The parties have urged this Court to decide the case using a two step analysis: first, a determination as to whether the act of voting was, as the Nevada Supreme Court found, an act protected by the First Amendment; and, second, apply the correct standard to the activity. IMLA, through this brief, urges the Court to also be mindful of well established due process considerations that might inform its decision.

The analysis for this case should begin and end with Nevada Revised Statutes § 281A.420(8)(e). It is this statutory provision which violates all notions of due process. This provision is a catch-all that fails to adequately describe the contours of lawful and unlawful conduct; and, it also delegates unbridled authority to those applying the law.

The absence of adequate boundaries within this law is clearly demonstrated by the record. First, Councilman Carrigan requested a legal opinion from the city's attorney regarding whether he should abstain from voting on the Lazy 8 matter. The City Attorney advised, through a formal legal memo, that Councilman Carrigan need only disclose his relationship with Mr. Vasquez on the record but he need not abstain from voting. Second, Councilman Carrigan followed the advice of counsel and then voted "aye" on the Lazy 8 project. Lastly, after a

complaint to the Nevada Commission on Ethics, the Councilman was found to have violated Nevada Revised Statutes § 281A.420(8)(e) based upon the "sum total" of his relationship with Mr. Vasquez.

Councilman Carrigan followed the advice of the city's attorney and was still found to have been in violation of the statute because of the "sum total" of his relationship with Mr. Vasquez. However, the words "sum total" appear nowhere in the statute. If (1) the Councilman's attorney cannot deduce the boundaries of the law as it applied in this particular situation and (2) the Nevada Commission on Ethics used a term found nowhere in the statute to support their finding that a violation had occurred, the rhetorical question is: Can anyone describe what conduct is prohibited by the statute? In this case, one plus two does not equal three; here, it is unclear what one plus two equals.

The uncertainty in this law cannot stand. This statute failed to put Councilman Carrigan (and the city's attorney) on notice of prohibited conduct and gave the Nevada Commission on Ethics authority to apply the law with unbridled authority – their "sum total" determination.

Additionally, Nevada's ethics statute is unlike any other states'. Although every state has a statute addressing conflicts of interest, no other state's recusal statute contains the inherently vague language found in Nevada's statute. Other states' statutes give representatives clear direction as to when a conflict of interest exists so as to not unnecessarily obstruct the republican form of

government by denying a representative his or her right to vote. Nevada's legislature cannot have it both ways. They cannot fail to define prohibited conduct and, at the same time, require recusal where potentially no conflict of interest exists – all at the expense of local government officials and the citizens they represent. Every state but Nevada has found a way to balance the competing interests at the forefront in this case: the need for clearly defined recusal statutes and the elected official's right to vote.

As legal advisors to local elected officials across this nation, IMLA respectfully requests this Court evaluate the statute under the well established due process principles set out below and find Nevada Revised Statutes § 281A.420(8)(e) void for vagueness.

ARGUMENT

A. The catch-all provision of Nevada Revised Statutes § 281A.420 is unconstitutionally vague.

The proper operation of democratic government requires that local government officials be independent, impartial and not use public office for personal gain. Therefore, conflict of interest regulations and recusal requirements for local government officials are unquestionably vital to the proper, efficient and honest operation of government such that the public can have confidence in the integrity of their government. As such, the proper role for clearly defined conflict of interest statutes in

American society is not questioned. However, when these statutes are enacted with such vague language that a local government official is unable to understand and comply with the requirements, the goal of an efficient and honest operation of government is not furthered.

The vagueness doctrine is based on the principle that a statute that either forbids or requires an act in terms so vague that "men of common intelligence" must necessarily guess at its meaning and apply it in differing manners violates due process. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Vagueness arguments are in no short supply in case law for good reason: vague laws can trap the innocent with the guilty by failing to provide fair warning of what conduct is prohibited. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A vague regulation impermissibly delegates policy matters of the most basic nature to policemen, judges and juries for resolution on a subjective basis. *See id.* at 108-09.

The subject matter of the law under consideration dictates the light in which the vagueness argument is viewed. The amount of vagueness that is tolerated and the amount of fair notice and enforcement that is required hinges on the type of law being considered. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982). "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v.*

Goguen, 415 U.S. 566, 573 (1974) (discussing the void for vagueness doctrine).

The "aye" vote cast by Councilman Carrigan on the Lazy 8 matter was determined by the Supreme Court for the State of Nevada to be speech protected under the First Amendment. *See Carrigan v. Comm'n on Ethics of Nev.*, 236 P.3d 616, 621 (Nev. 2010). As the Brief for Respondent points out "[t]he vote, moreover - like each of the foregoing votes - was the culmination of a lengthy political process . . . This Court has imbued every step along this path with the highest level of First Amendment protection." (Resp.'s Br. 24-25). Nevada's statute requires a local government official to abstain from this protected speech when a matter before him or her affects the local government official's "commitment in a private capacity to the interest of others." NEV. REV. STAT. § 281A.420(2)(c) (2007). In the case before the Court, the Nevada legislature failed to announce with specificity the boundaries of the law. This being said, the activity affected by the vague statute need not be protected speech, and this Court need not consider whether or not the activity in this case is protected under the First Amendment to find it unconstitutionally vague.

B. The catch-all provision of Nevada Revised Statutes § 281A.420 is unconstitutionally vague as it leaves an individual without knowledge of the nature of the activity that is prohibited.

Vague ethical statutes are contrary to due process because they fail to fairly put local

government officials on notice as to the prohibited conduct and/or relationships and leave both local government officials and local government attorneys guessing at their application. The vast majority of local government officials are not career professional politicians with professional advisors and staffs. Instead, they are citizen public servants serving for nominal pay out of an obligation to seek the common good for their community. Often, they serve as a city council member while simultaneously working a full-time job.

Unquestionably, local government is closest to the people. Local governments routinely address matters of great importance to the daily lives of its citizens; it is also the most accountable to its people. Local government officials serve at home and have daily contact with their constituents. For example, local government officials are held accountable to citizens when shopping in local stores or dropping children off at neighborhood schools. These local government officials were elected by their friends, neighbors and members of their church. Many represent smaller cities with no in-house city attorney and limited available resources with which to constantly engage legal counsel for determinations relative to the application of vague statutes. Therefore, it is only fair that legislators provide clearly defined ethical statutes to guide these dedicated public servants.

In the case before the Court, the Nevada Legislature formulated a statute in Nevada Revised Statutes § 281A.420 for the recusal of public officers in situations where a conflict of interest might exist.

The statute sets forth four instances where a local government official is considered to have a "commitment in a private capacity to the interests of others" which will trigger the need for the local government official to abstain from voting. Essentially, the local government official cannot vote on matters which involve:

a. a member of the local government official's household;

b. a person related to the local government official by blood, adoption or marriage within the third degree of consanguinity or affinity;

c. someone who employs the local government official or a member of the local government official's household; or

d. someone with whom the local government official has a substantial and continuing business relationship.

The relationships identified in (a), (b) and (c) refer to individuals in the local government official's life. Subsection (d) uses the words "substantial and continuing" to describe a business relationship but gives no further guidance as to how substantial a substantial relationship need be before abstention is required. The Nevada Legislature then placed a catch-all provision to catch any "substantially"

similar relationship to one of the four standards: "any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." NEV. REV. STAT. § 281A.420(8)(e) (2007). The inherent vagueness of the catch-all provision becomes even more apparent when attempting to identify a "relationship that is substantially similar" to a "substantial and continuing business relationship" described in subsection (d).

The Nevada Supreme Court correctly found that the catch-all language failed to "adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal." *Carrigan*, 236 P.3d at 623. A basic principle of due process is that a statute is void for vagueness if its prohibitions are not clearly defined. *See Grayned*, 408 U.S. at 108 (discussing the void for vagueness doctrine). Due process ensures that a statute creating an offense be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally*, 269 U.S. at 391. In this case, a first time violation could be subject to a civil penalty of up to $5,000. NEV. REV. STAT. § 281A.480 (2007). This is more than twice what many local government officials receive annually for their service to their community. *See* ARLINGTON, TEX., CODE OF ORDINANCES, CHARTER CHAPTER, art. IV, § 6 (2005) (providing for a salary of $250 per month for the mayor and $200 per month for council members).

What better illustration of the statute's inherent vagueness than disagreement among the members of the Nevada Commission on Ethics as to which relationship was violated. Commission members could not agree as to whether the relationship between Councilman Carrigan and Mr. Vasquez was substantially similar to a familial relationship or a business relationship. Nev. Comm'n on Ethics, Excerpts of Transcript, Aug. 29, 2007 Hearing, Joint App. p. 243-67. Instead the Commission found that:

> the *sum total* of their commitment and relationship equates to a "substantially similar" relationship to those enumerated under NRS 281.501 (8)(a)-(d), including a close personal friendship, akin to a relationship to a family member, and a "substantial and continuing business relationship."

Nev. Comm'n on Ethics Opinions 06-61, 06-62, 06-66 and 06-68 (2007), Joint App. p. 96-112.

However, the statute does not provide the option for a "sum total" determination. The Nevada legislature separated each of the four relationships by use of the disjunctive "or". Canons of construction indicate that terms connected in the disjunctive be given separate meanings. *See Garcia v. United States*, 469 U.S. 70, 73 (1984). Therefore, each relationship stands on its own. The statute clearly did not put Councilman Carrigan on notice that he would be held subject to a "sum total" relationship

created out of whole cloth by the Commission with no support from the statute.

Nor does the rule of *ejusdem generis* relieve the statute of its inherent vagueness. *Ejusdem generis* is a rule of statutory construction which literally means "of the same kind or class." BLACK'S LAW DICTIONARY 556 (8th ed. 2004). This rule is used to aid in ascertaining the correct meaning of words when there is uncertainty by limiting general terms which follow specific ones to matters similar to those specified. *See Gooch v. United States*, 297 U.S. 124, 128 (1936). Thus, "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. PPG Indus.*, 446 U.S. 578, 588 (1980). However, the rule does not apply to restrict the operation of a general statement where the specific things enumerated have no common characteristic. 73 AM. JUR. 2D *Statutes* § 136 (2010). For example, in the phrase "all horses, mules, cattle, sheep, hogs, and other live animals," the general language of "and other live animals" will be held to include only four legged animals similar to those listed; birds would not be included. *Reiche v. Smythe*, 80 U.S. 162, 165 (1872). It follows that the specific phrases set forth in the Nevada statute should be within the same kind or class if the doctrine is to apply and give meaning to the general phrase. Therefore, if the specific, different relationships set forth in subsections a-d signify subjects, persons or things greatly different from one another, *ejusdem generis* will not apply.

In this instance, two relationships are familial while the later two relationships are business/employment related. Applying *ejusdem generis* to Nevada's statute, it is unclear what single kind or class is being referred to. Some might argue that the class is limited to "close, significant and continuing relationships." However, that class is much more expansive than the four relationships described. For example, would such a class include the local government official's neighbor, doctor, barber, dentist, minister, grocer, etc.? If the doctrine of *ejusdem generis* does not apply, then the general catch-all provision with its inherent vagueness must stand on its own.

At times, the availability of an advisory opinion has provided grounds for overcoming a void for vagueness argument. *See United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973) ("It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law.") In the case at hand, the availability of an advisory opinion offers little to no assistance in removing doubt as to the meaning of the law. Local government attorneys are routinely confronted with questions from local government officials concerning the application of ethics statutes. It is true that there is a mechanism in the Nevada statute in which the local government official can obtain an Ethics Commission opinion for instances in which application of the ethics statute are uncertain.

However, the Nevada Commission on Ethics has 45 days to render such an opinion. NEV. REV. STAT. § 281A.440 (2007). In the local government context, a local government official rarely, if ever, knows 45 days in advance what items will be on a city council agenda in order to timely make such a request. There may only be three days from the time an item is placed on the governing body's agenda and the local government official becomes aware that the item will be considered and the time of the meeting. *See* TEX. GOV'T CODE ANN. § 551.043 (Vernon 2009) (requiring the agenda for a meeting of the governing body be posted 72 hours before the meeting is scheduled to begin). Many city charters require the elected city council members to vote on all matters that come before the city council unless there is a conflict of interest. Citizens expect their local government officials to represent their interests by voting on the issues that matter to them. However, as a practical matter, should this law be upheld, local government attorneys will be more likely to advise local government officials to abstain from voting on a matter. If the Nevada Commission on Ethics later determines that the relationship does *not* present a "commitment in the private capacity to the interest of others," the local government official and his or her constituents will have already been irrevocably harmed because the official will have missed his or her opportunity to vote on the matter.

In the case before the Court, Councilman Carrigan acted as any reasonable city council member would act. Before he cast his vote on the Lazy 8 matter he consulted and obtained an opinion from his city attorney. Councilman Carrigan

followed the advice of his city attorney to a tee and disclosed, on the record, his relationship with Mr. Vasquez prior to the vote. The Nevada Commission on Ethics confirmed that Councilman Carrigan believed that he had fulfilled his duty under the Nevada statute and never intended to circumvent the law. *See* Nev. Comm'n on Ethics Opinions 06-61, 06-62, 06-66 and 06-68 (2007), Joint App. p. 96-112.

This Court has invalidated a state bar rule under the void for vagueness doctrine with facts very similar to the facts of Councilman Carrigan's case. In *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), an attorney attempted to comply with a vague state bar rule and this Court found that, indeed, a "conscious effort" at compliance was made. It was not until months later that the attorney was disciplined for the conduct in question. *See id.* at 1051. There, Mr. Gentile, as is the case here with Councilman Carrigan, had reason to suppose that his particular conduct was not in violation of the law at issue. *See id.* at 1044. Further, neither Mr. Gentile nor Councilman Carrigan committed plainly prohibited conduct. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (noting that Mr. Gentile "had reason to suppose that his particular statements . . . would not violate the rule, yet he was disciplined nonetheless."). These are not cases in which the alleged violator raises a vagueness argument in an effort to avoid discipline. These are cases of a reviewing body acting as a Monday morning quarterback. Here, Nevada local government officials are placed in the precarious position of either abstaining from the protected speech of voting or being subject to a $5,000 sanction

under a statute that clearly fails to provide fair warning as to what relationships are included. *See* NEV. REV. STAT. § 281A.480(1)(a) (2007).

C. The catch-all provision of Nevada Revised Statutes § 281A.420 is unconstitutionally vague as it delegates unbridled authority to those who apply the law.

As detailed above, the due process doctrine of vagueness incorporates notions of fair notice or warning. The doctrine also requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement. *See Goguen*, 415 U.S. at 573; *e.g. Grayned*, 408 U.S. at 108. Due process demands substantial specificity in the language of a statute when such statute is capable of encroaching upon rights protected by the First Amendment. *See Goguen*, 415 U.S. at 573. This Court has "recognize[d] that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies." *Id.* at 574. Nevada's Code of Ethical Standards fails to provide specificity as to which relationships and commitments give rise to a conflict

of interest and which do not so as to prevent arbitrary and discriminatory enforcement of the law.

Nevada Revised Statutes § 281A.420 requires that a local government official abstain from voting when such matter would be "materially affected by ... his commitment in a private capacity to the interest of others." Nevada Revised Statutes § 281A.420(8) provides a definition of "commitment in the private capacity to the interest of others" that lends itself to not just one or two but an indefinite number of possible interpretations. Specifically, Nevada Revised Statutes § 281A.420(8)(e) provides that any other commitment or relationship that is "substantially similar" to four enumerated commitments and relationships affects the local government official's commitment in a private capacity to the interest of others. What relationship would be considered substantially similar to the relationship one has with his aunt, uncle, niece, nephew, great-grandparent or great-grandchild or his wife's family members with the same titles? These are the relationships to the third degree of consanguinity or affinity and the relationships with which one is to compare all other relationships. *See* NEV. REV. STAT. § 281A.420(8)(b) (2007). Depending upon your own personal experiences, this may include a close friend or it may include a stranger on the street with whom you only share a passing conversation.

Similar to the vague oath that was required of public employees in *Baggett v. Bullitt*, 377 U.S. 360, 385 (1964), the range of relationships that might be deemed "substantially similar" to the enumerated

list is very wide. The office of city council is rarely a full-time job and local government officials are more likely to have relationships with those in the community who bring matters before the governing body. They attend church together, their children are in the same schools, they attend the same social gatherings, and work for the same local businesses. In short, local government officials *live* in the community they represent and their relationships with those who bring matters before the governing body run the gamut.

Just as the oath in *Baggett* could have been interpreted so broadly as to prevent criticism of a state flag's color scheme, the Nevada statute could be interpreted so broadly as to prevent a government official from ever voting on any matter. *See id.* Such a subjective standard leaves the statute susceptible to arbitrary and discriminatory enforcement. This is no more apparent than the transcript from the Nevada Commission on Ethics hearing on this matter. Although the Commission found that Councilman Carrigan had violated the ethics statute by failing to abstain from voting on the Lazy 8 matter, the members disagreed as to which of the enumerated commitments or relationships the relationship between Councilman Carrigan and Mr. Vasquez was "substantially similar." Nev. Comm'n on Ethics, Excerpts of Transcript, Aug. 29, 2007 Hearing, Joint App. p. 243-67.

This is not the first time this state has encountered the vagueness in their ethics statute. In an opinion from the Nevada Attorney General it was noted that "[i]t is apparent from the increasing

number of questions concerning these statutes that the Nevada Legislature will in all likelihood be asked to consider reviewing and refining the current laws so public officials will better understand and be able to comply with these rules." Opinion of the Nevada Attorney General 98-27 (1998), Joint App. p. 94. No such refining was done to Nevada Revised Statutes § 281A.420 prior to Councilman Carrigan's vote in October of 2006.

In addition, an earlier version of Nevada's ethics statute was overturned by a state court as unconstitutionally vague. *Gates v. Nev. Comm'n on Ethics*, No. A393960, slip op. at 2 (Clark Cnty. Nev. Dist. Ct. Sept. 9, 1999) (Resp.'s App.). After examining the relationships at issue the court noted that "[i]f the Legislature wishes to include these relationships in the future, it is the body that will have to specify such relationships more clearly in the statutory language." *Id.* at 15a. The Ethics Commission has taken the position that the current catch-all provision was a codification of this opinion. Nev. Comm'n on Ethics, Excerpts of Transcript, Aug. 29, 2007 Hearing, Joint App., p. 249-50. It is difficult to reason that "any other commitment or relationship that is substantially similar . . ." is a clear specification of such relationships; rather it appears that the Nevada legislature has replaced a vague statute with an even vaguer one.

There are certain areas of conduct where legislatures cannot establish precise standards and an on-the-spot assessment by those applying the law is necessary, such as controlling the range of disorderly conduct. *Goguen*, 415 U.S. at 581-82

citing Colten v. Ky., 407 U.S. 104 (1972). However, there is no reason for the legislature to give unbridled authority to those regulating the ethical behavior of local government officers and, in the same sentence, fail to properly outline the boundaries of the law for those who are responsible for following the law.

D. The catch-all provision of Nevada Revised Statutes § 281A.420 is unique among the nation's ethics statutes.

Nevada Revised Statutes § 281A.420 is truly unique among ethics statutes in the country. IMLA is not aware of any other state statute containing a vague catch-all provision like the one found in the Nevada statute. A determination that this statute fails due to vagueness would not require blanket revision of the nation's ethics laws. State legislatures have come up with a number of ways to balance the need for ethics laws that clearly define conflicts of interest with the elected official's right to vote without resorting to vague catch-all provisions.

Like Nevada, Delaware's statute considers a conflict of interest to exist when an elected official's independence of judgment is impaired. DEL. CODE ANN. tit. 29, § 5805(1) (2010). The statute states that the "[i]ndependence of judgment" is impaired when the enactment or defeat of a measure would result in a financial benefit or detriment to accrue to the elected official or his family, or the member (or his or her family member) has a financial interest in the measure. DEL. CODE ANN. tit. 29, § 5805(2) (2010). The statute clearly defines financial interest.

DEL. CODE ANN. tit. 29, § 5804(5) (2010). Although aimed at addressing the same impairment of judgment as Nevada, Delaware's statutory language is more direct and leaves little room for interpretation. The significant difference between Delaware's and Nevada's recusal statute is that Delaware's statute does not contain the onerous catch-all provision.

Numerous states precisely define the relationships that present a conflict of interest and require abstention. The abstention requirements found in the Texas statute serve as an example of clarity. Texas prohibits elected officials from voting on a matter when the elected official has a substantial interest in the business entity. TEX. LOC. GOV'T CODE ANN. § 171.004 (Vernon 2009). The Texas statute defines "substantial interest in a business entity" very narrowly, including details such as percentages of ownership and specific monetary amount. TEX. LOC. GOV'T CODE ANN. § 171.002 (Vernon 2009). Connecticut's statute is also very detailed concerning the elected officials' abstention from voting. An elected official with an interest that is in substantial conflict with the proper discharge of his duties is prohibited from taking any official action on the matter. CONN. GEN. STAT. § 7-148(h) (2010). A substantial conflict is tied to a direct monetary effect on the public official, his family, or his business. *Id.* To address any unclear terms, there is an extensive definition section, which defines terms such as "business with which he is associated," "gift" and "necessary expenses." CONN. GEN. STAT. § 1-79 (2010). Likewise, Ohio's public officials are forbidden from voting in very specific

scenarios: when an elected official knows he or she (or a family member) is an employee, business associate, or contracted person to the legislative agent advocating for the legislation. OHIO REV. CODE ANN. § 102.031(B) (Anderson 2010). Although the Ohio statute provides that violations are subject to criminal penalties, the statute clearly puts individuals on notice of prohibited activity. Arizona's law is also very specific, distinguishing a "substantial interest" from a "remote interest" and it is only when an elected official has a substantial interest in a decision that he or she is prohibited from voting. ARIZ. REV. STAT. ANN. §§ 38-502; 38-503 (2010).

Several states have enacted ethics statutes that are intended to provide guidance for elected officials with no civil or criminal penalties. *See* ARK. CODE ANN. § 21-8-304(a) (2009); ME. REV. STAT. ANN. tit. 1, § 1014 (2010); MINN. STAT. § 10A.07 (2011). Illinois's statute is one such example; while less precise in distinguishing which relationships present a conflict of interest, the statute serves as an ethical guideline only and elected officials are not subject to civil or criminal penalty for failing to abstain. 5 ILL. COMP. STAT. 420/3-202; 420/3-206 (2010). Similarly, Colorado's statute specifically states that in no case will the failure to disclose a conflict of interest constitute a breach of the public trust of legislative office. COLO. REV. STAT. § 24-18-107(4) (2010).

A lesser number of states appear to allow the elected official or governmental body to determine when recusal is necessary. Nebraska's statute provides that recusal due to a conflict of interest is

optional; in fact, an elected official may document why he believes there is no potential conflict and why he chose to vote. NEB. REV. STAT. § 49-1499 (2010). South Dakota allows elected officials to either disclose their interest or abstain from voting when they have a direct pecuniary interest in a matter before the governing body. S.D. CODIFIED LAWS § 6-1-17 (2010). Alternatively, the governing body can require abstention when at least two-thirds of the body decides that the member has an identifiable conflict of interest. *Id.*

Overall, these statutes appear to effectively balance the need for ethics laws that clearly define conflicts of interest with the elected official's right to vote. The Nevada statute's catch-all provision is unique. The statute contains an unworkable provision that breeds confusion. Requiring the Nevada legislature to clearly define the boundaries of lawful and unlawful conduct benefits everyone but especially elected officials, like Councilman Carrigan, who would abstain from voting when the situation demands it.

CONCLUSION

This Court should affirm the Nevada Supreme Court's judgment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No 10-568

In The
Supreme Court of the United States

NEVADA COMMISSION ON ETHICS, Petitioners

v.

MICHAEL A. CARRIGAN, Respondents

On Writ of Certiorari To the Supreme Court of Nevada

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Other Authorities

Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. App. Prac. & Process 59 (2005) 17

James Bopp, Jr. and Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The* Sui Generis *Recusal Test of* Caperton v. Massey, 60 Syracuse L. Rev. 305 (2010) 7 n.2

John Gibeaut, *Caperton Capers: Court's Recusal Sparks States to Mull Judicial Contribution Laws,* ABA Journal, Aug. 2009 ..... 9 n.3

JoAnne Viviano, *Ohio Chief Justice Wants New Ethics Policy*, Ohio.com, June 10, 2009 ..... 9 n.3

Statement of Interest[1]

The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005, by Bradley A. Smith, a professor of law at Capital University Law School and a former chairman of the Federal Election Commission, and Stephen M.

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[1] The parties have consented to the filing of this brief. No party counsel authored any of this brief, and no party, party counsel, or person other than amici or their counsel paid for brief preparation and submission.

Hoersting, a campaign finance attorney and a former general counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and in-formation flow.

Summary of Argument

Traditionally, states require recusal from voting when a legislator, or in some cases, a family member, has a substantial financial or personal interest in the bill or issue. A few states simply require full disclosure to the voting body about a potential conflict. The Nevada ruling is an outlier in this regard.

These recusal requirements have been expanded recently in the judicial context. States have begun adopting judicial canons that require recusal based upon prior campaign speech. Some states believe such requirements are constitutionally justified under this Court's *Caperton v. Massey* decision, which required a judge to recuse based on substantial independent expenditures made by a litigant during his campaign. Given the effectiveness of these requirements to deter speech in the judicial context, that it is now beginning to be pursued in the legislative context is unsurprising.

These new recusal requirements—whether judicial or legislative—penalize protected speech and association. Candidates must choose between 1) self-censorship and limit associations during their campaigns, and 2) exercising their right to speak and associate but jeopardize their ability to vote.

That they can create this choice is in part derived from their vagueness. But even where they are clear, their broad scope allows them to be applied to political speech and association. Like the judicial context, the effect of such vagueness or breadth is to unconstitutionally chill legislative candidates' protected speech and association and leaves legislative candidates vulnerable to strategic action by other political actors.

Argument

I. The Nevada Rule Extends Recusal Far Beyond Its Traditional Scope.

A. Mandatory Recusal Requirements Traditionally Focus On Personal and Financial Interests.

Not all states have established mandatory recusal rules for legislators. Some states instead only encourage a legislator to abstain from voting, and in some cases from participation in debating the bill. *See, e.g.*, Ariz. Sen. R. 30 ("A member may abstain from taking any action in which he has a personal financial interest"); Ind. Sen. R. 4 ("A Senator may request to be excused from voting on a question because of a direct personal or pecuniary interest . . . . Whether a Senator has a direct personal or pecuniary interest so as to be excused from voting on a question shall be decided without debate"); NY House R. V, Sec. 2 ("A member may abstain from a vote only on the grounds that such vote will constitute a conflict of interest"); NC House R. 24.1A ("Any member shall, upon request, be excused in advance from the deliberations and voting on a particular bill at any time that the reason for the request arises in the proceedings on the bill"); NC Sen. R. 29(c), (e) ("Any Senator may move to be excused at any time from voting on any matter...The Senator so excused shall not debate the bill"); W. Vir. House R. 49 ("When a question is put, any member having a direct personal or pecuniary interest therein should announce this fact and request to be excused from voting").

But in those states that have established mandatory recusal rules for legislative voting, the typical recusal rules are oriented towards financial or personal

interest. Legislators are most commonly directed to abstain from official conduct such as voting on matters where they have a direct, substantial financial interest. *See, e.g.*, Iowa House R. 76 ("No member shall vote on any question in which that person is financially interested"); Miss. House R. 26 ("No member shall vote on any question in the result of which he is pecuniarily interested"); New Mex. Stat. Sec.10-16-4 ("It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing his own financial interest or financial position").

The other typical conflict warranting mandatory recusal is having a substantial personal interest or benefit in the bill, contract, or other legislation before the official. *See, e.g.*, Ala. Code 36-25-5(a) ("No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself"); Fla. House R. 3.2(a) ("A member may not vote on any measure that the member knows or believes would inure to the member's special private gain or loss"); Ky. Constitution Sec. 57 ("A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly, shall disclose the fact to the House of which he is a member, and shall not vote thereon upon pain of expulsion"). In Nevada, Senators are directed to recuse from a vote when they are "in any way personally or directed interested." Nev. Sen. R. 32.

In some states, recusal based on financial or personal interest extends to the financial interests of family members. *See, e.g.*, Ky. Rev. Stat. 6.761(1) ("A legislator shall not intentionally participate in the discussion of a question in committee or on the floor of the

General Assembly, vote, or make a decision in his official capacity on any matter . . . [i]n which he, or any member of his family, or the legislator's business associate will derive a direct monetary gain or suffer a direct monetary loss as a result of his vote or decision"); La. Rev. Stat. Title 42 Sec. 1112(B), 1120 (requiring elected officials and public servants to recuse themselves from participating in a transaction where a member of their immediate family has a substantial economic interest).

Several states do not require legislators to recuse from voting based on personal or financial interest, but instead require only that they disclose such interests. For example, Nevada Assembly members needed to only disclosure any conflict of interest. Nev. Assembly R. 23. *See also* Tennessee Senate Rules 13, 85 (allowing senators to vote provided that "the Senator declares that 'It may be considered that I have a degree of personal interest in the subject matter of the bill, but I declare that my argument and my ultimate vote answer only to my conscience and my obligation to my constituents and the citizens of the State of Tennessee'"); Utah Code Sec. 76-8-109(2)(b)("Before or during any vote on legislation or any legislative matter in which a legislator has actual knowledge that the legislator has a conflict of interest . . . the legislator shall orally declare to the committee or body before which the matter is pending that the legislator may have a conflict of interest and what that conflict is").

No party disputes the constitutionality of recusal requirements generally. All of these recusal requirements relate to current conflicts of interest, and not

prior interests, statements, or associations.[2] And none of these standards—whether a direct personal or financial interest, or that of a family member—reflect any concern that mere campaign associations and speech create grounds for a conflict of interest that warrants recusal. Indeed, the Nevada rule is an outlier in that it has been interpreted and applied to campaign speech and association. And it is when recusal requirements implicate First Amendment rights that their constitutionality is called into question.

B. Recent Changes to Recusal Requirements Encompass Campaign Speech and Association.

Recently, some states have attempted to broaden the role of recusal to include matters of political speech and association. This first occurred in the judicial speech realm.

In 2002, this Court ruled in *Republican Party of Minnesota v. White*, 536 U.S. 475 (2002) that judicial candidates have a First Amendment right to announce their views on disputed legal, social, and political issues. *Id.* Since then, numerous courts have struck down judicial canons that reached announced views through vaguely-worded "commits" clauses and overbroad "pledges and promises" clauses. *See, e.g., Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005) (overruled on other grounds); *Indiana Right to Life v. Shepard*, 463 F. Supp. 879 (N.D. Ind. 2006) (overruled on other grounds); *Kansas Judicial*

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[2] *See* James Bopp, Jr. and Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The* Sui Generis *Recusal Test of* Caperton v. Massey, 60 Syracuse L. Rev. 305, 320-21 (2010).

Watch v. Stout, 440 F. Supp. 2d 1209 (D. Kan. 2006); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. N.D. 2005). However, these cases also found the application of recusal requirements to campaign announcements to be constitutional despite the chilling effect it had on candidates' campaign speech. *Alaska Right to Life*, 380 F. Supp. 2d at 1083-84; *Indiana Right to Life*, 463 F. Supp. at 887; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1234-35; *North Dakota Family Alliance*, 361 F. Supp. 2d at 706-09.

In response to the *White* decision and the subsequent demise of the pledge and promises and commits clauses, the American Bar Association revised its Model Code of Judicial Conduct twice, moving the offending commits clause, which directly regulated judicial candidates' political campaign speech, to the recusal canon. *See* ABA Model Code of Judicial Conduct Canon 3E(1) (2003) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding"); ABA Model Code of Judicial Conduct 2.11(A)(5) (2007) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [instances where] . . . [t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a par-

ticular result or rule in a particular way in the proceeding or controversy").

Following the ABA's lead, several states began to adopt these model revisions into their code of judicial conduct. *See* Fla. Code of Judicial Conduct 3E(1)(f) (substantially adopting the ABA's 2003 revision); Ind. Code of Judicial Conduct 2.11(A)(5) (adopting the ABA's 2007 revision); Wis. SCR 60.04(4)(f) (adopting the ABA's 2007 revision after its adoption of the ABA's 2003 revision was held unconstitutionally vague and overbroad under the First Amendment by a federal district court). The net effect and goal of these new recusal requirements has been to impose an indirect restriction on campaign speech and association.

Some viewed this Court's recent decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), as an affirmation of this new regulatory strategy.[3] In *Caperton*, this Court held that a West Virginia Supreme Court justice was required by due process to recuse himself from a matter involving a party that gave 2.5 million to a third party organization that supported the justice's election bid. Notably, the *Caperton* decision was focused on due process concerns as implicated by those who disproportionately and substantially participate in a judicial election and then subse-

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[3] John Gibeaut, *Caperton Capers: Court's Recusal Sparks States to Mull Judicial Contribution Laws*, ABA Journal, Aug. 2009, *available at* http://www.abajournal.com/magazine/article/caperton_capers; JoAnne Viviano, *Ohio Chief Justice Wants New Ethics Policy*, Ohio.com, June 10, 2009, http://www.ohio.com/news/ohiocentric/47548647.html.

quently appear before that judge. *Id.* at 2256.[4] But it was enough to motivate some state supreme courts to revise their recusal standards, like New York, which is in the process of adopting new recusal rules based on campaign contributions exceeding $2500, NY Rules of the Chief Administrator of the Courts, Part 151 (February 23, 2011), and Michigan, which vastly broadened their rules. *See* Mich. Court R. 2.003(C)(1) ("A judge is disqualified when . . . (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey*, US (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."); Mich. Court R. 2.003(C)(2) ("A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.").[5]

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[4] This Court again briefly discussed recusal in *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010). But there, too, the discussion was not about regulating political speech: "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." *Id.* The *Caperton* analysis did not address the issue of how a candidate's prior speech and association would necessitate that judge's subsequent recusal.

[5] A significant shift in this recusal paradigm is that the legislator cannot fix the conflict. While most pecuniary interests and personal benefits can be remedied by the sale of the interest or removing the source of the benefit, past asso-

In light of this trend in the judicial context, it is not surprising to see efforts to expand these indirect campaign regulations into the legislative realm. Petitioners here ask this Court to adopt the premise that publicly elected officials serve as impartial arbiters like judges, *see* Pet. Br. at 34-35, to tie that final intellectual knot between the two branches and thereby justify the regulation. But the role of legislators has been recognized as having at least some distinction from that of judges by this Court. For example, judicial candidates can be prohibited from making pledges or promises of how they will vote in particular cases because of the due process interest litigants have in having their case heard by an impartial judge. *White*, 536 U.S. at 780-81. In *Brown v. Hartlage*, 456 U.S. 45 (1982), by contrast, this Court held that legislative candidates could not be prohibited from making such pledges and promises. *Id.* at 55 ("Some promises are universally acknowledged as legitimate, indeed 'indispensable to decisionmaking in a democracy.'") (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978))

The Nevada Recusal Rule, however, serves only to undermine *Brown*. Under *Buckley v. Valeo*, 424 U.S. 1 (1976), one of the justifications for disclosure requirements is that the "sources of a candidate's financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance." *Id.* at 67. Similarly, *Brown* noted that "[c]andidate commitments enhance the accountability of government officials to

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ciations and speech cannot be undone. Bopp, *supra* note 2.

the people whom they represent, and assist the voters in predicting the effect of their vote." *Brown*, 456 U.S. at 55-56. Under *Brown* and *Buckley*, voters may use information about a candidate's associations and responsiveness to different individuals and interest groups to help predict how the candidate will act in office and thus help determine their vote. The Nevada Recusal Rule, however, attempts to overturn the decision of the voters in this regard, by forcing officials to recuse themselves based on the very political associations that may have led voters to support them to begin with. Functionally, the Nevada Rule impairs the ability of voters to predict the effect of their vote by attempting to burden indirectly speech it cannot directly prohibit. *See Davis v. FEC*, 128 S.Ct. 2759, 2772 (2008) (holding that penalties on candidates who "robustly exercise[a] First Amendment right" are just as burdensome as direct restrictions on speech).

In any event, whether legislator or judge, these broad rules—whether vague or solely as applied to political speech and association—create a new and substantial First Amendment burden on candidates: it chills core political speech. *See Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007).

II. Recusal Laws That Reach Political Speech And Association Penalize and Chill First Amendment Rights.

This Court noted in *Davis*, placing burdens on candidates who "robustly exercise[a] First Amendment right . . . is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis*, 128 S.Ct. at 2772. Broadly written recusal rules like those at issue here can have—and likely will

have—the effect of penalizing First Amendment speech and association. They require political candidates to choose between not engaging in political speech and associations during their campaign or enduring the burden of being precluded from engaging in key political speech in office: voting.

Part of this effect is derived from vagueness. This Court has recognized two types of vagueness that will render a law constitutionally invalid. First, a law may be void for vagueness under the Fifth Amendment if it does not give "fair notice" of the meaning of an offense. *United States v. Williams*, 553 U.S. 285, 304 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.")

In addition, this Court has also held that a law may be unconstitutionally vague based on the effect that it has on the exercise of First Amendment rights. As this Court held in *Buckley*, "vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to' steer far wider of the unlawful zone '. . . than if the boundaries of the forbidden areas were clearly marked.'" *Buckley*, 424 at 41 n.48 (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972), *quoting Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), *quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958)). A law is vague if it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ."

Grayned, 408 U.S. at 108-09; *see also Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (holding that when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply.").[6]

Vague recusal requirements impose a *Davis*-like involuntary choice upon those subject to them, a choice between speaking and risking recusal or simply not speaking at all.[7] But even when recusal requirements

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[6] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) is not to the contrary. Not only did *Holder* involve a Fifth Amendment rather than a First Amendment vagueness challenge, but the plaintiffs in *Holder* only challenged the statute as applied to them, rather than on its face. *Id.* at 2719 ("In spite of its own statement that it was not addressing a 'facial vagueness challenge,' the Court of Appeals considered the statute's application to facts not before it.") (internal citations omitted). For this reason, this Court held that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim *under the Due Process Clause of the Fifth Amendment for lack of notice.*" *Id.* (emphasis added).

[7] This Court requires that any First Amendment chill the results from an allegedly vague law must be more than subjectively stifle speech. *Laird v. Tatum*, 408 U.S. 1, 14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"). Instead, objective harm must arise from offending law. *Bigelow v. Virginia*, 421 U.S. 809,816-17 (1975). When recusal requirements are vague, or can be broadly applied to reach protected speech and association, they present that precise objective harm.

are not facially vague, if they are overbroad, *see* Resp. Br. at 55, or are at least broad enough to be applied to political speech and association, *see* Resp. Br. at 50-51, they still objectively chill candidates' speech because they can be construed to reach political associations (as was done in this case) and campaign speech.

As Respondents demonstrate, Petitioners' application of Nevada's recusal requirement to political association clearly burdens the legislator's right to vote. Resp. Br. at 23-29. Nevada's recusal requirement states that:

> [A] public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:
>
> . . .
>
> (c) The public officer's commitment in a private capacity to the interests of others.

Nev. Rev. Stat. 281A.420(3). Construing recusal requirements like this to prohibit voting based on political associations directly burdens that right to vote.

But this construction will also have the effect of chilling a candidate—who may not yet even be a legislator—from associating with groups and individuals during his campaign because such an association may be sufficiently "committed" that the legislator will be precluded from doing the very thing he is there to do: voting on key legislation. In an effort to avoid creating grounds for possible recusal, a legislative candidate

will choose to avoid, in as much as he is able, any political associations that could trigger recusal. Such avoidance interferes with the heart of the political process by chilling constitutionally protected associations.

This chilling effect is similar to that seen in the judicial campaign context. For example, in *North Dakota Family Alliance*, *Duwe*, and *Kansas Judicial Watch*, judicial candidates would not respond to questionnaires that simply inquired after their views on disputed legal and political issues, including views on marriage, *see, e.g.*, *North Dakota Family Alliance*, 361 F. Supp. 2d at 1028; abortion, *see, e.g.*, *Duwe*, 490 F. Supp. 2d at 971, and taxes, *see, e.g.*, *Kansas Judicial Watch*, 440 F. Supp. 2d at 1217. While the threat of discipline in these cases derived from the direct regulation of the pledges and promises clause and the commits clause, it also stemmed from the indirect, subsequent penalty imposed upon them if and when they assumed the bench. *See North Dakota Family Alliance*, 361 F. Supp. 2d at 1027; *Duwe*, 490 F. Supp. 2d at 971-72; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1218. In exercising their right to announce their views, judicial candidates ran the very real risk of creating grounds for recusing themselves from the very role they were campaigning so hard to acquire. Faced with this choice, they chose to be silent and forego their constitutional right to speak.

There is no reason to believe this would not be the effect in the legislative context as well if this Court holds that the Nevada recusal requirement is constitutional. Allowing vague or broadly-worded recusal requirements to apply to prior campaign associations will create for legislative candidates the invol-

untary choice of either 1) limiting their associations to those they know they would already create a conflict of interest or 2) to associate with volunteers like Mr. Carrigan did with Mr. Vasquez and run the risk of forfeiting the very purpose of their campaign in the first place. And the choice to self-censor associations would be an objective chill given the broad scope of such recusal requirements.

In addition to imposing a involuntary choice on legislative candidates, vague and expansive recusal standards also leave elected officials vulnerable to strategic action by other political actors. *See* Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. App. Prac. & Process 59, 72 (2005) (noting that while "the subject of strategic recusal . . . is not often discussed, no doubt because the goal seems unfair and perhaps unethical . . . you can be sure that strategic recusals do occur"). As then Judge Breyer noted in the judicial context, the standards governing recusal "must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989).

Recusal requirements like Nevada's objectively chill and thereby at impose a substantial burden on First Amendment speech. They are thus subject to strict scrutiny, *Davis,* 128 S. Ct. at 2772, and under such scrutiny, they fail. *See* Resp. Br. at 41-59.

Conclusion

Because Nevada's recusal requirement chills core political speech, is facially vague and overbroad, and is not narrowly tailored to a compelling state interest as applied to political speech, it is unconstitutional. The Nevada Supreme Court's decision should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

AMICUS CURIAE BRIEF OF THE NEVADA LEGISLATURE

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INTEREST OF AMICUS CURIAE

Under Nevada Revised Statutes (NRS) 218F.720, the Nevada Legislature is authorized to appear in any action to protect its official interests, including actions challenging the validity of Nevada's statutes. Leg. App. 1a. In the district court, the Legislature defended the constitutionality of Nevada's recusal statute—NRS 281A.420—by filing an *amicus curiae* brief and presenting oral argument at the hearing. Pet. App. 41a-42a. The Legislature also filed an *amicus curiae* brief with the Nevada Supreme Court. Pet. App. 6a. In this Court, the parties consented to the filing of *amicus curiae* briefs.[1]

Because the Legislature enacted Nevada's recusal statute to promote ethical conduct and prevent the appearance of impropriety, corruption and bias by its public officers, the Legislature has a vital interest in defending the statute and upholding Nevada's important public policy of requiring its officials to abstain from voting when they have ethical conflicts that undermine "the people's faith in the integrity and impartiality of public officers." NRS 281A.020.

As an *amicus curiae* in the state courts, the Legislature made several arguments in response to Carrigan's First-Amendment challenges. Pet. App. 56a-58a. As an *amicus curiae* in this Court, the Legislature focuses on its threshold argument: the First Amendment does not protect conduct which the Due Process Clause forbids.

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[1] Per Rule 37.6, the Legislature states that counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no other person made such a monetary contribution.

Specifically, when Carrigan voted on Red Hawk's application, he was acting in an administrative capacity, not in a legislative capacity, and his extreme ethical conflicts created an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk. Under such circumstances, Carrigan's voting was not protected by the First Amendment. It was forbidden by the Due Process Clause.

Because this argument addresses the pivotal issue of whether Carrigan's voting was protected by the First Amendment, the Legislature believes its argument "may be of considerable help to the Court." Rule 37.1. This argument is properly before the Court because it falls within the questions presented for review under Rules 14.1(a) and 24.1(a), and it was briefed and presented to and considered by the state courts. Pet. App. 18a, 57a-58a.

In addition to the arguments made herein, the Legislature joins and concurs in the arguments made by the Nevada Commission on Ethics (Commission) in its brief on the merits.

SUMMARY OF ARGUMENT

This case falls at the intersection of the First and Fourteenth Amendments. Because the First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, the First Amendment does not protect conduct which the Due Process Clause forbids.

A fair hearing in a fair tribunal is a basic requirement of due process. To ensure fairness at administrative hearings, the Due Process Clause forbids the participation of decisionmakers whose

extreme ethical conflicts create an objective and constitutionally intolerable risk of prejudgment or actual bias.

The Nevada Supreme Court held that Carrigan's act of voting on the Lazy 8 was protected by the First Amendment because he was voting in a "legislative" proceeding. Pet. App. 11a. Carrigan, however, was voting in an administrative proceeding where an impartial and disinterested tribunal was a basic requirement of due process and where Carrigan's extreme ethical conflicts created an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk. Under such circumstances, Nevada's recusal statute did not violate Carrigan's First-Amendment rights because his act of voting was not protected by the First Amendment. It was forbidden by the Due Process Clause.

The Lazy 8 hearing was not a legislative proceeding because the council was not enacting a land-use policy of general applicability. Instead, the council was conducting an administrative land-use proceeding where it was applying existing land-use policies to make a specific and individualized decision regarding Red Hawk's application. Consequently, the council members needed to be neutral decisionmakers who were free of ethical conflicts that created a serious, objective risk of prejudgment or actual bias. Carrigan was not such a neutral decisionmaker at the Lazy 8 hearing.

Carlos Vasquez, the principal lobbyist for Red Hawk who appeared, testified and lobbied at the Lazy 8 hearing, was at the same time serving as Carrigan's campaign manager during Carrigan's

then-ongoing and contentious reelection bid. The predominant issue during Carrigan's campaign was the suitability of the controversial Lazy 8 project. During this period, Vasquez actively solicited campaign contributions for Carrigan, including soliciting contributions from persons who were principals either in Red Hawk or one of its affiliates or who were otherwise directly interested in the success of the Lazy 8. Vasquez also contributed significant amounts of time, effort and at-cost services to Carrigan's campaign.

During Carrigan's two prior successful elections to the council, Vasquez served as Carrigan's campaign manager, and he made significant contributions of time, effort and at-cost services to those campaigns. Outside the context of Carrigan's campaigns, Vasquez had a substantial and continuing political, professional and personal relationship with Carrigan as his political advisor, confidant and close personal friend for more than a decade.

Given Vasquez's close-knit and long-standing relationship with Carrigan at the time of the Lazy 8 hearing, his prominent and public role as Carrigan's campaign manager and fundraiser during Carrigan's then-ongoing reelection campaign, and his extensive, extraordinary and indispensable contributions to the success of Carrigan's reelection, Vasquez would have appeared to an objective observer to be favorably positioned to exert significant and disproportionate influence over Carrigan as a decisionmaker at the hearing. Thus, a reasonable person would have had an objective and legitimate fear that Carrigan was predisposed to favor Vasquez and his client Red Hawk—a fear that was realized when Carrigan made

the initial motion to approve Red Hawk's project. Taken together, these exceptional and unusual circumstances combined to create an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk. As a result, Carrigan was disqualified by the Due Process Clause from voting on Red Hawk's application, even if he did not harbor any actual bias.

Thus, the Nevada Supreme Court erred when it concluded that Carrigan's act of voting was protected by the First Amendment because Carrigan was constitutionally prohibited from voting on Red Hawk's application by the Due Process Clause. The Nevada Supreme Court also erred when it concluded that the catchall provision in Nevada's recusal statute is facially overbroad in violation of the First Amendment. Because Carrigan's conduct fell squarely within the intended scope of the recusal statute and was constitutionally prohibited, Carrigan had to meet the heavy burden of showing that the statute forbids a substantial amount of protected activity in situations outside of his own prohibited conduct. Carrigan failed to meet his burden.

Like common-law and judicial recusal rules, Nevada's recusal statute promotes ethical conduct and prevents the appearance of impropriety, corruption and bias by its public officers. The statute does not prohibit a substantial amount of protected activity in relation to its many legitimate applications. Even though the catchall provision is stated in general terms, its scope is limited by the specific relationships expressly described in the statute, and a reasonable public officer can easily deduce the statute's potential reach. To the extent

public officers need further guidance, they can request advisory opinions from the Commission and thereby remove any doubt as to the meaning of the law. If the Court were to invalidate Nevada's recusal statute as facially overbroad, the state would lose an invaluable tool in safeguarding the people's faith in the integrity and impartiality of public officers.

ARGUMENT

A. Nevada's recusal statute did not infringe on Carrigan's First-Amendment rights because his act of voting on Red Hawk's application was not protected by the First Amendment. It was forbidden by the Due Process Clause.

The First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996). It follows, therefore, that the First Amendment does not protect conduct which the Due Process Clause forbids.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). To ensure fairness in administrative proceedings, the Due Process Clause forbids the participation of decisionmakers whose extreme ethical conflicts create an objective and constitutionally intolerable risk of prejudgment or actual bias. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, 129 S.Ct. 2252, 2263-65 (2009); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973).

In the Nevada Supreme Court, Carrigan did not contest the Commission's or the district court's factual and legal findings that his ethical conflicts

disqualified him from voting under Nevada's recusal statute. Pet. App. 33a. If this was an ordinary case, Carrigan's statutory ethical violations would not have required further scrutiny under the Due Process Clause. *Caperton*, 129 S.Ct. at 2267 ("Because the codes of [ethical] conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.").

However, when this case is viewed appropriately through our nation's deep-rooted notions of fair play and impartial justice, this cannot be considered an ordinary case. Even the most objective observer would have been shocked when Carrigan's long-time campaign manager, fundraiser, political adviser and close personal friend—who was publicly and aggressively working to secure Carrigan's reelection at that very moment—appeared at the Lazy 8 hearing as a paid lobbyist for Red Hawk to publicly and aggressively lobby Carrigan and his fellow council members to approve Red Hawk's project. In this type of extraordinary situation, where an impartial and disinterested tribunal was essential to the appearance of fairness and justice, the Due Process Clause prohibited Carrigan from voting because his extreme ethical conflicts "created a constitutionally intolerable probability of actual bias." *Caperton*, 129 S.Ct. at 2262.

1. Carrigan was acting in an administrative capacity, not in a legislative capacity, when he voted on Red Hawk's application.

In Nevada, cities serve as "the agency by and through which the state exercises its sovereignty in a given locality." *State ex rel. City of Reno v. Reno Traction Co.*, 41 Nev. 405, 413, 171 P. 375, 377 (1918). They do not have the constitutional power of home rule. *State ex rel. Rosenstock v. Swift*, 11 Nev. 128, 140 (1876). Thus, each of Nevada's cities "is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication. Its officers or agents, who administer its affairs, are created by the legislature, and chosen or appointed in the mode prescribed by the law of its creation." *Id.* Because Nevada's municipal officers are always subject to the Legislature's sovereign control, they are "mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature." *City of Reno v. Stoddard*, 40 Nev. 537, 542, 167 P. 317, 318 (1917).

The Nevada Constitution allows the Legislature to create cities through special acts, Nev. Const. art. 8, § 1; *Rosenstock*, 11 Nev. at 142-45; *Western Realty v. City of Reno*, 63 Nev. 330, 350-51, 172 P.2d 158, 168 (1946), and through general laws for municipal incorporation. Nev. Const. art. 8, § 8; NRS chs. 265-267; *State ex rel. Williams v. District Court*, 30 Nev. 225, 227-28, 94 P. 70, 71 (1908). In this case, the Legislature created the City of Sparks through a special act establishing its city charter. 1975 Nev.

Stat., ch. 470, at 724, as amended. Under that city charter, the Sparks City Council, consisting of five elected members, serves as the city's governing body. Sparks City Charter §§ 1.060, 2.010; Leg. App. 20a-21a.

Like other city councils, the Sparks City Council performs both legislative and administrative functions. See *Nevadans for Prot. of Prop. Rights v. Heller*, 122 Nev. 894, 914, 141 P.3d 1235, 1248 (2006) ("Unlike the Legislature, which performs strictly legislative functions, a local government body performs administrative functions as well."); *City of Mobile v. Bolden*, 446 U.S. 55, 59 (1980) (noting that the city's "three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality."). The mixture of these functions in the same city council does not transgress Nevada's separation-of-powers doctrine because that doctrine requires divided functions only in the three departments of state government. It does not require such separation in local governments. See Nev. Const. art. 3, § 1; *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P. 437, 439 (1893); *State ex rel. Mason v. Board of County Comm'rs*, 7 Nev. 392, 396-97 (1872).

Under this Court's jurisprudence, local governing bodies perform legislative functions when they enact laws, rules or policies of general applicability. *Bogan v. Scott-Harris*, 523 U.S. 44, 54-56 (1998). Ordinarily, such legislative functions will not trigger the procedural protections of the Due Process Clause because the local bodies are establishing standards that govern the population generally and they are not making individualized decisions regarding "[a] relatively small number of persons . . . who [are]

exceptionally affected, in each case upon individual grounds." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915).

In the legislative arena, the inherent checks and balances of the legislative process provide their own procedural safeguards, and the people can protect their rights against legislative abuses "by their power, immediate or remote, over those who make the rule." *Id.* at 445. Thus, when local bodies legislate, their "legislative determination provides all the process that is due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985).

By contrast, local governing bodies perform administrative functions when they apply existing laws, rules or policies to make individualized decisions affecting the property rights of particular persons or groups. *Londoner v. City of Denver*, 210 U.S. 373, 385-86 (1908).[2] Because individual rights are at stake, local governing bodies must perform their administrative functions in a manner that comports with procedural due process. *Id.* This includes providing notice and a fair hearing before "an impartial and disinterested tribunal." *Marshall*, 446 U.S. at 242.

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[2] Because administrative functions require decisionmakers to adjudicate the merits of each case upon individual grounds, such functions are also called adjudicative or quasi-judicial. See *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 245 (1973) (explaining "distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.").

Like other local proceedings, land-use proceedings are either legislative or administrative depending on the nature of the decision. *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 673-74 (1976). When local governing bodies promulgate citywide zoning plans or rezone particular areas under those plans, they are enacting laws, rules or policies of general applicability, and they are usually making legislative decisions. *Id.*; *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

However, when local governing bodies apply existing land-use laws, rules or policies to make individualized decisions about specific property, they are usually making administrative decisions. See *Eastlake*, 426 U.S. at 674 n.9. In *Eastlake*, Justice Stevens commented on "the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels." *Id.* at 683 (Stevens, J., dissenting). He further noted the widely-held view that "[w]hen the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency." *Id.* at 685 n.7 (quoting R. Babcock, The Zoning Game 158 (1966)).

In line with this view, many courts have recognized that land-use matters which require local governing bodies to make individualized decisions about specific property are typically administrative decisions, not legislative decisions. See, *e.g.*, *Cutting v. Muzzey*, 724 F.2d 259, 261-62 (CA1 1984); *Acierno*

v. Cloutier, 40 F.3d 597, 610-15 (CA3 1994); *Scott v. Greenville County*, 716 F.2d 1409, 1422-23 (CA4 1983); *Bryan v. City of Madison*, 213 F.3d 267, 273-74 (CA5 2000); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 895-97 (CA6 1991); *LC&S, Inc. v. Warren County Area Plan Comm'n*, 244 F.3d 601, 602-05 (CA7 2001); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 611 n.5 (CA8 1980); *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1219-24 (CA9 2003); *Sable v. Myers*, 563 F.3d 1120, 1123-27 (CA10 2009); *75 Acres, LLC v. Miami-Dade County*, 338 F.3d 1288, 1293-95 (CA11 2003); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1392-93 (CA11 1993); *Crymes v. DeKalb County*, 923 F.2d 1482, 1485-86 (CA11 1991).

Because local governing bodies are sitting as administrative tribunals in these land-use proceedings, courts have found that the proceedings must comport with procedural due process. See, *e.g.*, *Wedgewood L.P. I v. Township of Liberty*, 610 F.3d 340, 354-55 (CA6 2010); *Nasierowski Bros.*, 949 F.2d at 895-97; *Harris v. County of Riverside*, 904 F.2d 497, 501-02 (CA9 1990). And since the appearance of fairness and justice is an essential component of procedural due process, courts have determined that the members of such governing bodies must be unbiased decisionmakers "[b]ecause it is a hallmark of procedural due process that 'a biased decisionmaker is constitutionally unacceptable.'" *Nasierowski Bros.*, 949 F.2d at 896 n.8 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Thus, when confronted with an unconstitutionally high probability of prejudgment or bias by decisionmakers in administrative land-use proceedings, courts have

held that disqualification is constitutionally required. See, *e.g.*, *Marcia T. Turner, LLC v. City of Twin Falls*, 159 P.3d 840, 846 (Idaho 2007); *Eacret v. Bonner County*, 86 P.3d 494, 498-501 (Idaho 2004); *City of Hobart v. Behavioral Inst.*, 785 N.E.2d 238, 253-54 (Ind. Ct. App. 2003); *McPherson Landfill v. Board of County Comm'rs*, 49 P.3d 522, 531-33 (Kan. 2002); *Tri-County Concerned Citizens v. Board of County Comm'rs*, 95 P.3d 1012, 1018 (Kan. Ct. App. 2004); *Thornbury Twp. v. W.D.D., Inc.*, 546 A.2d 744, 746-47 (Pa. Commw. Ct. 1988); *Champlin's Realty v. Tikoian*, 989 A.2d 427, 443-44 (R.I. 2010); *Armstrong v. Turner County Bd. of Adjustment*, 772 N.W.2d 643, 650-52 (S.D. 2009).

In prior cases, the Nevada Supreme Court has followed the weight of authority and distinguished between legislative and administrative land-use decisions. For example, in *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006), the court determined that a local governing body's decision to waive zoning and development standards so a developer could build a nonconforming structure on a specific parcel was an administrative decision reviewable by the courts "to determine, based on the administrative record, whether substantial evidence supports the administrative decision." See also *Bing Constr. Co. v. County of Douglas*, 107 Nev. 262, 265-66, 810 P.2d 768, 769-70 (1991) (holding that a local governing body's decision to revoke a special use permit required compliance with procedural due process).

By contrast, in *City of Reno v. Citizens for Cold Springs*, 126 Nev. ___, 236 P.3d 10, 12-15 (2010), the court determined that a local governing body's

decision to enact ordinances amending its master plan for a rural valley and changing the zoning for a large undeveloped area of 6,800 acres was a legislative decision. The court explained that "[t]he enactment of zoning ordinances and amendments by local municipal entities constitutes sound legislative action." 236 P.3d at 15.

In this case, the Nevada Supreme Court did not thoroughly analyze whether Carrigan was voting in a legislative or administrative proceeding. Instead, it concluded that all elected officials have a First-Amendment right to vote on public issues based on its "recognition of voting as a core *legislative* function," and on "other jurisdictions' holdings that voting in a *legislative* setting is protected speech." Pet. App. 11a (emphasis added). The record, however, establishes that Carrigan was not performing a legislative function or voting in a legislative setting.

When federal constitutional rights are at issue, the Court's determination of whether an act is legislative or administrative is a question of federal law. *Bogan*, 523 U.S. at 55-56. While the Court's determination may be informed by how the act is characterized under local law, the Court is not bound by local labels. *Id.* Instead, the Court looks to the substance of the act to determine whether it "bore all the hallmarks of traditional legislation." *Id.* at 55.

Furthermore, the simple fact that a legislator performs an official act does not, *ipso facto*, mean the act is legislative. *Doe v. McMillan*, 412 U.S. 306, 313 (1973); *United States v. Brewster*, 408 U.S. 501, 512-13 (1972); *United States v. Johnson*, 383 U.S. 169, 172 (1966). As the Court observed regarding federal

legislators: "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel v. United States*, 408 U.S. 606, 625 (1972).

The Court also does not inquire into the motives or intent of the officials performing the act. *Bogan*, 523 U.S. at 54-56. Rather, the Court asks whether the act, "stripped of all considerations of intent and motive," was legislative in substance. *Id.* at 55. Thus, the Court's determination turns on the substantive nature of the act and whether it involved a legislative function. *Id.*

In this case, the council's decision on Red Hawk's application was not legislative in substance, nor did it exhibit any of the hallmarks of traditional legislation or otherwise involve a legislative function. From an examination of the Lazy 8 hearing minutes, it is clear the council was not legislating in a traditional sense because it did not enact or amend an ordinance.[3] The council also was not performing a legislative function because it did not create laws, rules or policies of general applicability or make decisions with prospective implications reaching beyond the particular facts of Red Hawk's application. Cf. *Bogan*, 523 U.S. at 55-56.

Red Hawk applied for *tentative* approval of a *single* project. J.A. 15-19. If the council had granted tentative approval, its action would have been

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[3] To enact or amend an ordinance, the council had to follow the legislative process mandated by its charter, including proposing a bill. Sparks City Charter §§ 2.070-2.080; Leg. App. 21a-23a. At the hearing, the council did not propose a bill or otherwise follow the required procedures for enacting or amending an ordinance. J.A. 20-81.

extremely narrow in scope and duration and would have temporarily changed the individual property rights of a single applicant. Such narrow and temporary action does not resemble the type of general and permanent laws, rules and policies that are ordinarily associated with traditional legislation. See *Bi-Metallic*, 239 U.S. at 445. Rather, it resembles the type of specific and individualized actions that mandated procedural due process in *Londoner*, 210 U.S. at 385-86.

Consequently, the council was not performing a legislative function. It was performing an administrative function because it was applying existing land-use laws, rules and policies to make a specific and individualized decision about the suitability of the Lazy 8 and its consistency with the city's master plan.

This conclusion is buttressed by the fact that under Nevada's Planned Unit Development Law (PUD Law), the council's denial of Red Hawk's application was "a final administrative decision" for purposes of judicial review. NRS 278A.590(1); Sparks Municipal Code § 20.18.090; Leg. App. 18a-19a, 29a.

Red Hawk's application proposed modifications to two PUDs—Tierra Del Sol and Wingfield Springs—located within the Northern Sparks Sphere of Influence (NSSOI) master plan. J.A. 35. When Red Hawk filed its application, it held rights to build a hotel-casino at Wingfield, and it wanted to modify both PUDs by transferring its hotel-casino rights to Tierra Del Sol in order to build the Lazy 8 there. J.A. 20-41. The city's staff explained that a master plan amendment was unnecessary because the project "doesn't change the integrity of the NSSOI plan; it

simply moves the use to, what staff believes, is a more appropriate location." J.A. 26.

Because Red Hawk's application requested PUD modifications, it was governed by Nevada's PUD Law and the city's supplemental PUD ordinance. NRS 278A.430; Leg. App. 7a-19a, 24a-29a; J.A. 27, 80.[4] The PUD Law and ordinance contain detailed administrative procedures for seeking tentative and final approval of PUDs and modifications thereto. NRS 278A.430-278A.590; Sparks Municipal Code §§ 20.18.060-20.18.090; Leg. App. 7a-19a, 24a-29a. Those procedures include providing notice and an adversarial hearing, making detailed findings of fact, establishing specific conditions, requirements, and timelines for development, and mailing a copy of the council's decision directly to the developer. *Id.* If the developer is aggrieved by the decision, the PUD Law and ordinance provide that:

> Any decision of the city . . . granting or denying tentative or final approval of the plan or authorizing or refusing to authorize a modification in a plan is *a final administrative decision* and is subject to judicial review in properly presented cases.

NRS 278A.590(1) (emphasis added); Sparks Municipal Code § 20.18.090; Leg. App. 18a-19a, 29a.

The individualized procedures in the PUD Law and ordinance are very common procedures for modern administrative proceedings. They are quite foreign, however, to the traditional legislative process. See *Bi-Metallic*, 239 U.S. at 445. And

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[4] The city's PUD ordinance, Sparks Municipal Code ch. 20.18, was enacted under the authority of NRS 278A.080.

considering that the PUD Law and ordinance expressly make the denial of tentative approval "a final administrative decision" for purposes of judicial review, there is considerable support for the conclusion that the council was performing an administrative function, not a legislative function.

Further, in interpreting Nevada's PUD Law, the Nevada Supreme Court has explained that:

> A "prime objective" of NRS Chapter 278A is to promote "flexibility of development." NRS 278A.110(3). A developer can maintain flexibility until it receives final approval for and records provisions of the plan. At that point, the features of a PUD enforceable under NRS 278A.400 are established.

Glenbrook Homeowners Ass'n v. Glenbrook Co., 111 Nev. 909, 915, 901 P.2d 132, 137 (1995).

Because the features of a PUD remain flexible and changeable until final approval, the developer can explore "nonbinding proposals and ideas" during the tentative approval process. *Id.* Tentative approval, therefore, does not create "enforceable commitments on the part of a developer." *Id.* Tentative approval also does not authorize the developer to proceed with development. NRS 278A.520(2); Sparks Municipal Code § 20.18.060(G) ("Tentative approval does not qualify a plat or the planned unit development for recording or authorize development or the issuance of any building permit."); Leg. App. 12a, 27a.

Nonbinding flexibility during the tentative approval process is certainly important to administering the complex and constantly evolving land-use plans of each specific PUD. However,

considering that tentative approval does not create binding laws, rules or policies of a general and permanent nature, tentative approval does not exhibit any of "the hallmarks of traditional legislation." *Bogan*, 523 U.S. at 55.

Finally, in her dissent, Justice Pickering noted that the Nevada Supreme Court in an unpublished order in a different case "held that the Lazy 8 vote represented a land-use decision reviewable, if at all, by a petition for judicial review under NRS 278.3195(4)." Pet. App. 18a; but see Nev. Sup. Ct. Rule 123 ("An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority"). Under NRS 278.3195, which is part of Nevada's general land-use law, an aggrieved person may seek review of "administrative decisions regarding the use of land." NRS 278.3195(1); Leg. App. 4a; *Kay*, 122 Nev. at 1104-06, 146 P.3d at 804-05. Although it is not important for this case, it is likely that the council's decision was reviewable under both NRS 278A.590 and NRS 278.3195, with the PUD-specific provisions of NRS Chapter 278A taking precedence over the general land-use provisions of NRS Chapter 278. What is important for this case is that the council's decision was reviewable under either statute because it was an *administrative* decision.

In sum, the council's decision regarding Red Hawk's application was not legislative in substance, it did not resemble traditional legislation, and it did not involve the performance of a legislative function. It was an administrative decision, and council members needed to be impartial and disinterested decisionmakers free from ethical conflicts that

created a serious, objective risk of prejudgment or actual bias. Regrettably, Carrigan was not such a decisionmaker at the Lazy 8 hearing.

2. The Due Process Clause disqualified Carrigan from voting because his ethical conflicts created an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk.

To guarantee that a person will not be unfairly deprived of life, liberty or property in an unjust or biased proceeding, "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall*, 446 U.S. at 242. Although the requirement of neutrality has its origins in judicial proceedings, the Court has extended it to administrative proceedings where the requirement "applies to administrative agencies which adjudicate as well as to courts." *Withrow*, 421 U.S. at 46; *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."). Accordingly, when the Court evaluates whether the Due Process Clause disqualifies an administrative decisionmaker, the Court utilizes the same standards of constitutional disqualification that apply to judges. *Withrow*, 421 U.S. at 46-47; *Gibson*, 411 U.S. at 579 ("most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.") (quoting K. Davis, *Administrative Law Text* § 12.04, p. 250 (1972)).

All cases alleging disqualification start with the presumption that the decisionmaker is unbiased.

Schweiker, 456 U.S. at 195. "This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Id.* The burden of establishing disqualification rests on the party making the assertion. *Id.* at 196. In the case of constitutional disqualification, this is a heavy burden because it is generally only "an extraordinary situation where the Constitution requires recusal," and only the "extreme cases are more likely to cross constitutional limits." *Caperton*, 129 S.Ct. at 2265. In ordinary cases, "[b]ecause the codes of [ethical] conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution." *Id.* at 2267.

Constitutional disqualification "preserves both the appearance and reality of fairness." *Marshall*, 446 U.S. at 242. Not only must decisionmakers be free from actual bias, they must be free from "a constitutionally intolerable *probability* of actual bias." *Caperton*, 129 S.Ct. at 2262 (emphasis added). The reason for such disqualification is that "our system of law has always endeavored to prevent even the probability of unfairness." *Withrow*, 421 U.S. at 47 (quoting *Murchison*, 349 U.S. at 136). Simply put, "justice must satisfy the appearance of justice." *Marshall*, 446 U.S. at 243 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

When applying the constitutional disqualification standards, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*,

129 S.Ct. at 2262. Under this test, the potential for bias must be gauged by the reasonable perceptions of an objective observer, and the inquiry must involve "a realistic appraisal of psychological tendencies and human weakness." *Withrow*, 421 U.S. at 47. The decisionmaker is disqualified if all the surrounding circumstances, when viewed objectively, "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Caperton*, 129 S.Ct. at 2264 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

Thus, a decisionmaker does not have to harbor actual bias at a hearing to be constitutionally disqualified. *Id.* at 2263. If, at the time of the hearing, there were "extreme facts that created an unconstitutional probability of bias," *id.* at 2265, the decisionmaker is disqualified because his participation "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47.

In *Caperton*, the Court addressed for the first time the issue of constitutional disqualification in the context of judicial elections. In that case, Don Blankenship was the chairman, chief executive officer and president of several affiliated West Virginia coal companies that a jury found liable for $50 million in damages for fraudulent and tortious conduct against other mining and coal companies. After the jury's verdict but before any appeal to the West Virginia Supreme Court, Blankenship worked aggressively and successfully to have Brent Benjamin elected to the state supreme court. As described by this Court:

> Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

129 S.Ct. at 2264 (citations omitted).

When the case against Blankenship's companies came before the West Virginia Supreme Court, Justice Benjamin refused repeated recusal motions based on the potential for bias created by Blankenship's extraordinary involvement in the campaign. In a 3-to-2 decision in which Justice Benjamin was in the majority, the state supreme court reversed the $50 million verdict.

This Court held that Justice Benjamin was constitutionally disqualified from hearing the case because Blankenship's extraordinary involvement in Justice Benjamin's campaign created an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Blankenship and his companies. The Court explained that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." *Id.* at 2263. The Court found that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case." *Id.* at 2264.

Additionally, the Court found that "[t]he temporal relationship between the campaign contributions, the

justice's election, and the pendency of the case [was] also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." *Id.* at 2264-65. The Court observed that a legitimate fear of bias can arise when a person "chooses the judge in his own cause," regardless of whether the judge has agreed to decide the case in a particular way. *Id.* at 2265. The Court determined that the timing of Blankenship's campaign contributions in relation to the pending case was sufficient to raise a serious, objective risk of actual bias, stating that "[a]lthough there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome." *Id.*

Based on the totality of the circumstances, the Court held that "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level." *Id.* The Court cautioned that most campaign involvement will not present "a potential for bias comparable to the circumstances in this case." *Id.* The Court announced the type of campaign involvement that will require constitutional disqualification as follows:

> We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case *by raising funds or directing the judge's election campaign when the case was pending or imminent.*

Id. at 2263-64 (emphasis added).

The Court's decision in *Caperton* anticipated that there will be circumstances—similar to those in the instant case—when a judge is constitutionally disqualified from hearing a case because a party or attorney appearing before the judge is presently serving as the judge's campaign manager or fundraiser or is playing another substantial role in the judge's election efforts during an ongoing campaign. Indeed, several courts have already found that judges are disqualified under such circumstances. See, *e.g.*, *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1338 n.5 (Fla. 1990); *Neiman-Marcus Group v. Grey*, 829 So.2d 967, 968-69 (Fla. Ct. App. 2002); *Dell v. Dell*, 829 So.2d 969, 970 (Fla. Ct. App. 2002); *Caleffe v. Vitale*, 488 So.2d 627, 628-29 (Fla. Ct. App. 1986).

Several courts have also found that a judge is disqualified when a party or attorney appearing before the judge is actively soliciting campaign contributions on behalf of the judge or is publicly acting as the judge's campaign spokesman during an ongoing campaign. See, *e.g.*, *Pierce v. Pierce*, 39 P.3d 791, 796-800 (Okla. 2001); *Barber v. Mackenzie*, 562 So.2d 755, 757-58 (Fla. Ct. App. 1990); *Aetna Cas. & Sur. v. Berry*, 669 So.2d 56, 74-75, 79 (Miss. 1996), *overruled in part on other grounds by Owens v. Miss. Farm Bureau Cas. Ins.*, 910 So.2d 1065 (Miss. 2005).

For example, in *Caleffe v. Vitale*, the court held that a trial judge was disqualified from presiding over a divorce proceeding because "the wife's attorney is actually running the judge's ongoing reelection campaign. Common sense tells us that this alone would give rise to a reasonable fear on the petitioner's part that a conflict of interest may exist."

488 So.2d at 629. Consequently, the court held that the "specific and substantial political relationship" between the judge and the wife's attorney created an appearance of bias that required disqualification. *Id.*

Similarly, in *Barber v. Mackenzie*, the court held that a trial judge was disqualified from presiding over a divorce proceeding because the wife's two attorneys were members of the judge's campaign committee which was "actively conducting direct mail solicitation requesting contributions and endorsements." 562 So.2d at 757. In explaining the need for disqualification, the court stated:

> The Committee was formed at least one year prior to the election, and plainly contemplates a course of activity on behalf of the judge during the year leading up to the election. There is a substantial and continuing relationship between the Committee and the trial judge, in a matter of great and immediate importance to the judge. . . . [D]isqualification is called for here, where there is a continuing affiliation in a joint project lasting a considerable period of time. It is the nature of the relationship which compels the result. We conclude that a reasonable litigant in the position of movant would fear that the trial court will be aware of the membership and activities of her own contemporaneously active campaign committee, and will entertain a bias in favor of the side represented by her Committee members.

Id. at 757-58.

The instant case falls squarely into the disqualifying scenario envisioned by the Court in *Caperton*. Carlos Vasquez, a person with a personal

stake in the council's decision on the Lazy 8 because of his position as Red Hawk's lobbyist, had a significant and disproportionate influence in Carrigan's election to the council by raising campaign funds for Carrigan and directing Carrigan's election campaign while the hearing on Red Hawk's application was pending and imminent.

Vasquez became Carrigan's campaign manager and fundraiser approximately six months before the Lazy 8 hearing. Pet. App. 44a; J.A. 172. The predominant issue during Carrigan's campaign was the suitability of the controversial Lazy 8 project. Pet. App. 45a; J.A. 173-74. During this period, Vasquez actively solicited campaign contributions for Carrigan, including soliciting contributions from persons who were principals either in Red Hawk or one of its affiliates or who were otherwise directly interested in the success of the Lazy 8. Pet. App. 45a. Vasquez also contributed significant amounts of time, effort and at-cost services to Carrigan's campaign. Pet. App. 44a; J.A. 163-76, 207-09, 230-31, 240-42.

During the same period that Vasquez was serving as Carrigan's campaign manager and fundraiser, Vasquez was also actively involved in Red Hawk's efforts to gain the council's approval for the Lazy 8, including managing public relations for Red Hawk, engaging in discussions and negotiations with Carrigan and other council members, and testifying at the Lazy 8 hearing as a paid lobbyist and advocate for Red Hawk and publicly urging the council to approve the Lazy 8. Pet. App. 45a-46a; J.A. 39-45, 192, 206-07, 216-21, 233.

Further, during Carrigan's two prior successful elections to the council, Vasquez served as Carrigan's campaign manager, and he made significant contributions of time, effort and at-cost services to those campaigns. *Id.* Outside the context of Carrigan's campaigns, Vasquez had a substantial and continuing political, professional and personal relationship with Carrigan as his political advisor, confidant and close personal friend for more than a decade. Pet. App. 44a-45a; J.A. 161-63, 168-71, 177, 200-01, 215, 230-31.

Given Vasquez's close-knit and long-standing relationship with Carrigan at the time of the Lazy 8 hearing, his prominent and public role as Carrigan's campaign manager and fundraiser during Carrigan's then-ongoing reelection campaign, and his extensive, extraordinary and indispensable contributions to the success of Carrigan's reelection, Vasquez would have appeared to an objective observer to be favorably positioned to exert significant and disproportionate influence over Carrigan as a decisionmaker at the hearing. Thus, a reasonable person would have had an objective and legitimate fear that Carrigan was predisposed to favor Vasquez and his client Red Hawk—a fear that was realized when Carrigan made the initial motion to approve Red Hawk's project. Pet. App. 47a; J.A. 75-80. Taken together, these exceptional and unusual circumstances combined to create an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk. As a result, Carrigan was disqualified by the Due Process Clause from voting on Red Hawk's application, even if he did not harbor any actual bias.

Consequently, Nevada's recusal statute did not infringe on Carrigan's First-Amendment rights because his act of voting on Red Hawk's application was not protected by the First Amendment. It was forbidden by the Due Process Clause.

B. The catchall provision in Nevada's recusal statute is not facially overbroad in violation of the First Amendment.

Under Nevada's recusal statute, a public officer may have to abstain from voting on a matter if he has a "commitment in a private capacity to the interests of others." NRS 281A.420. This term is defined to mean that the public officer has a commitment to: (1) a member of his household; (2) a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (3) a person who employs him or a member of his household; or (4) a person with whom he has a substantial and continuing business relationship. *Id.* In addition to these four enumerated categories, the statute contains a catchall provision which provides that such commitments also include "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." *Id.*

The Nevada Supreme Court held that the catchall provision is facially overbroad in violation of the First Amendment because "[t]his catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal." Pet. App. 17a. The Nevada Supreme Court's holding should be reversed because the court did not properly apply the overbreadth doctrine.

A statute does not violate the overbreadth doctrine when its impact on First-Amendment rights is so speculative or slight that "[t]he First Amendment will not suffer if the constitutionality of [the statute] is litigated on a case-by-case basis." *Clements v. Fashing*, 457 U.S. 957, 971-72 n.6 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). A statute does not suffer from overbreadth merely because the statute has some speculative or unrealized potential to prohibit a marginal amount of protected speech. *Broadrick*, 413 U.S. at 615-17. To find a constitutional violation, "the overbreadth of [the] statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615 (emphasis added).

Therefore, to prevail in an overbreadth challenge, it is not enough for the challenger to show that there is a possibility of some overbreadth. Instead, the challenger "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988)). If the scope of the statute, as construed consistently with its intended purpose, reaches mostly unprotected activity, the statute will be upheld even though it "may deter protected speech to some unknown extent." *Broadrick*, 413 U.S. at 615.

With regard to Carrigan's act of voting on Red Hawk's application, Nevada's recusal statute clearly reached only unprotected activity given that Carrigan's extreme ethical conflicts created a constitutionally intolerable risk of actual bias and disqualified him from voting on Red Hawk's

application under the Due Process Clause. Since Carrigan's conduct fell squarely within the intended scope of the recusal statute and was constitutionally prohibited, Carrigan had to meet the heavy burden of showing that the statute forbids a substantial amount of protected activity "in other situations not before the Court." *Broadrick*, 413 U.S. at 610. Carrigan failed to meet his burden.

This Court has indicated that "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). When the catchall provision in Nevada's recusal statute is construed consistently with its intended purpose, it reaches only unprotected activity.

The catchall provision captures "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." NRS 281A.420. By its express terms, the catchall provision cannot be read in isolation. It must be read in conjunction with the provisions preceding it, and its scope must be limited by the specific commitments and relationships described in the subsection. Thus, the meaning of the catchall provision is "narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U.S. at 294.

The meaning of the catchall provision is also narrowed by the term "substantially similar." As commonly defined and used in the catchall provision,

"substantial" means "being largely but not wholly that which is specified." *Webster's Ninth New Collegiate Dictionary* 1176 (1990). "Similar" means "having characteristics in common," being "strictly comparable," or being "alike in substance or essentials." *Id.* at 1098. Synonyms for the term include "analogous" and "parallel." *Id.*

When all parts of the catchall provision are read together, a reasonable public officer can readily understand the types of relationships that are "substantially similar" to those he has with: (1) a member of his household; (2) a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (3) a person who employs him or a member of his household; or (4) a person with whom he has a substantial and continuing business relationship. Because the four enumerated categories all describe close, significant and continuing relationships, it follows that the catchall provision covers "substantially similar" close, significant and continuing relationships that, in large part, are strictly comparable, alike in substance or essentials, analogous or parallel to the expressly listed relationships.

Reasonable public officers have the acumen to know when they have a close, significant and continuing relationship with another person. To the extent they are in need of further guidance, they can request advisory opinions from the Commission. NRS 281A.440(1), 281A.460. The Court typically will not find a statute to be overbroad if persons "are able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the meaning of the law.'" *McConnell v. FEC*, 540 U.S. 93, 170 n.64

(2003) (citation omitted) (quoting *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973)).

Furthermore, the legislative history of the catchall provision provides additional guidance regarding its meaning. The sponsors of the legislation explained that they:

> did not want to specifically limit it to just these categories. But what we were trying to get at [were] relationships that are so close that they are like family. That they are substantially similar to a business partner. . . . [I]t has got to be a relationship that is so close, it is like family, it is like a member of your household, it is like a business partner.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42-43 (Nev. Mar. 30, 1999); Pet. App. 78a.

As an example of the catchall's application, the sponsors stated that if "the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person." *Id.*; Pet. App. 69a. The sponsors also believed the catchall:

> would give the ethics commission some discretion for those egregious cases that may slip through the cracks otherwise, while still giving some guidance to public officials who need to know what their obligations are. [They] declared this language to be an improvement on existing law and an appropriate balance

> between trying to provide guidance and trying to allow the ethics commission discretion.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 32-33 (Nev. Apr. 7, 1999); Pet. App. 79a-80a.

When Nevada's recusal statute is construed in line with its obvious meaning and intended scope, the statute is not significantly broader than the common-law rules of disqualification that courts have been applying for centuries. See 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 126 (2010); 83 Am. Jur. 2d *Zoning and Planning* §§ 731-34 (2003); Marjorie A. Shields, Annotation, *Bias or Interest of Administrative Officer Sitting in Zoning Proceeding as Necessitating Disqualification of Officer or Affecting Validity of Zoning Decision*, 4 A.L.R.6th 263 (2005).

It is also notable that at least one lower federal court has held that the judicial recusal rule requiring judges to recuse themselves when their "impartiality might reasonably be questioned" is not unconstitutionally overbroad. *Family Trust Found. v. Wolnitzek*, 345 F. Supp. 2d 672, 708-10 (E.D. Ky. 2004). Although the judicial recusal rule is stated in broad and general terms, the rule also contains four specific instances which require recusal. In *Family Trust Foundation*, the court held that the judicial recusal rule did not prohibit a substantial amount of protected speech in relation to its many legitimate applications, and that "if the Court were to invalidate the recusal laws based on overbreadth, then the state's ability to safeguard the impartiality or appearance of impartiality of the judiciary would be greatly compromised." *Id.* at 709-10; see also

Republican Party of Minn. v. White ("White II"), 416 F.3d 738, 755 (CA8 2005) (en banc), *cert. denied*, 546 U.S. 1157 (2006); *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005).

Like common-law and judicial recusal rules, Nevada s recusal statute promotes ethical conduct and prevents the appearance of impropriety, corruption and bias by its public officers. The statute does not prohibit a substantial amount of protected activity in relation to its many legitimate applications. Even though the catchall provision is stated in general terms, its scope is limited by the specific relationships expressly described in the statute, and a reasonable public officer can easily deduce the statute's potential reach. To the extent public officers need further guidance, they can request advisory opinions from the Commission and thereby remove any doubt as to the meaning of the law. If the Court were to invalidate Nevada's recusal statute as facially overbroad, the state would lose an invaluable tool in safeguarding "the people's faith in the integrity and impartiality of public officers." NRS 281A.020.

CONCLUSION

The decision of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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LEGISLATURE'S APPENDIX

NEVADA REVISED STATUTES (NRS)

NRS 218F.720 Authority to provide legal representation in actions and proceedings; exemption from fees, costs and expenses; standards and procedures for exercising unconditional right and standing to intervene; payment of costs and expenses of representation.

1. When deemed necessary or advisable to protect the official interests of the Legislature, one or more Houses of the Legislature or one or more agencies, members, officers or employees of the Legislature, the Legislative Counsel Bureau or the Legislative Department of State Government, the Legislative Commission, or the Chair of the Legislative Commission in cases where action is required before a meeting of the Legislative Commission is scheduled to be held, may direct the Legislative Counsel and his or her staff to appear in, commence, prosecute, defend or intervene in any action or proceeding before any court, agency or officer of the United States, this State or any other jurisdiction, or any political subdivision thereof. In any such action or proceeding, the Legislature, the Houses of the Legislature and the agencies, members, officers and employees of the Legislature, the Legislative Counsel Bureau and the Legislative Department of State Government may not be assessed or held liable for:

(a) Any filing or other court fees; or

(b) The attorney's fees or other fees, costs or expenses of any other parties.

2. If a party to any action or proceeding before any court, agency or officer:

(a) Alleges that the Legislature, by its actions or failure to act, has violated the Constitution, treaties or laws of the United States or the Constitution or laws of this State; or

(b) Challenges, contests or raises as an issue, either in law or in equity, in whole or in part, or facially or as applied, the meaning, intent, purpose, scope, applicability, validity, enforceability or constitutionality of any law, resolution, initiative, referendum or other legislative or constitutional measure, including, without limitation, on grounds that the law, resolution, initiative, referendum or other legislative or constitutional measure is ambiguous, unclear, uncertain, imprecise, indefinite or vague, is preempted by federal law or is otherwise inapplicable, invalid, unenforceable or unconstitutional,

➥ the Legislature may elect to intervene in the action or proceeding by filing a motion or request to intervene in the form required by the rules, laws or regulations applicable to the action or proceeding. The motion or request to intervene must be accompanied by an appropriate pleading, brief or dispositive motion setting forth the Legislature's arguments, claims, objections or defenses, in law or fact, or by a motion or request to file such a pleading, brief or dispositive motion at a later time.

3. Notwithstanding any other law to the contrary, upon the filing of a motion or request to intervene pursuant to subsection 2, the Legislature has an unconditional right and standing to intervene in the action or proceeding and to present its

arguments, claims, objections or defenses, in law or fact, whether or not the Legislature's interests are adequately represented by existing parties and whether or not the State or any agency, officer or employee of the State is an existing party. If the Legislature intervenes in the action or proceeding, the Legislature has all the rights of a party.

4. The provisions of this section do not make the Legislature a necessary or indispensable party to any action or proceeding unless the Legislature intervenes in the action or proceeding, and no party to any action or proceeding may name the Legislature as a party or move to join the Legislature as a party based on the provisions of this section.

5. The Legislative Commission may authorize payment of the expenses and costs incurred pursuant to this section from the Legislative Fund.

6. As used in this section:

(a) "Action or proceeding" means any action, suit, matter, cause, hearing, appeal or proceeding.

(b) "Agency" means any agency, office, department, division, board, commission, authority, committee, subcommittee or other similar body or entity, including, without limitation, any body or entity created by an interstate, cooperative, joint or interlocal agreement or compact.

(Added to NRS by 1965, 1461; A 1971, 1546; 1995, 1108; 1999, 2203; 2007, 3305; 2009, 1565)—(Substituted in revision for NRS 218.697)

NRS 278.3195 Governing body to adopt ordinance allowing appeal to governing body concerning certain decisions regarding use of land; required contents of ordinance; appeal of decision of governing body to district court.

1. Except as otherwise provided in NRS 278.310, each governing body shall adopt an ordinance providing that any person who is aggrieved by a decision of:

(a) The planning commission, if the governing body has created a planning commission pursuant to NRS 278.030;

(b) The board of adjustment, if the governing body has created a board of adjustment pursuant to NRS 278.270;

(c) A hearing examiner, if the governing body has appointed a hearing examiner pursuant to NRS 278.262; or

(d) Any other person appointed or employed by the governing body who is authorized to make administrative decisions regarding the use of land,

➥ may appeal the decision to the governing body. In a county whose population is 400,000 or more, a person shall be deemed to be aggrieved under an ordinance adopted pursuant to this subsection if the person appeared, either in person, through an authorized representative or in writing, before a person or entity described in paragraphs (a) to (d), inclusive, on the matter which is the subject of the decision.

2. Except as otherwise provided in NRS 278.310, an ordinance adopted pursuant to subsection 1 must set forth, without limitation:

(a) The period within which an appeal must be filed with the governing body.

(b) The procedures pursuant to which the governing body will hear the appeal.

(c) That the governing body may affirm, modify or reverse a decision.

(d) The period within which the governing body must render its decision except that:

(1) In a county whose population is 400,000 or more, that period must not exceed 45 days.

(2) In a county whose population is less than 400,000, that period must not exceed 60 days.

(e) That the decision of the governing body is a final decision for the purpose of judicial review.

(f) That, in reviewing a decision, the governing body will be guided by the statement of purpose underlying the regulation of the improvement of land expressed in NRS 278.020.

(g) That the governing body may charge the appellant a fee for the filing of an appeal.

3. In addition to the requirements set forth in subsection 2, in a county whose population is 400,000 or more, an ordinance adopted pursuant to subsection 1 must:

(a) Set forth procedures for the consolidation of appeals; and

(b) Prohibit the governing body from granting to an aggrieved person more than two continuances on the same matter, unless the governing body determines, upon good cause shown, that the granting of additional continuances is warranted.

4. Any person who:

(a) Has appealed a decision to the governing body in accordance with an ordinance adopted pursuant to subsection 1; and

(b) Is aggrieved by the decision of the governing body,

➥ may appeal that decision to the district court of the proper county by filing a petition for judicial review within 25 days after the date of filing of notice of the decision with the clerk or secretary of the governing body, as set forth in NRS 278.0235.

5. As used in this section, "person" includes the Armed Forces of the United States or an official component or representative thereof.

(Added to NRS by 2001, 2803; A 2003, 1734; 2007, 354)

NRS CHAPTER 278A
PLANNED DEVELOPMENT
GENERAL PROVISIONS

NRS 278A.010 Short title. This chapter may be cited as the Planned Unit Development Law.

(Added to NRS by 1973, 565)—(Substituted in revision for NRS 280A.010)

* * *

NRS 278A.080 Exercise of powers by city or county. The powers granted under the provisions of this chapter may be exercised by any city or county which enacts an ordinance conforming to the provisions of this chapter.

(Added to NRS by 1973, 566; A 1977, 1518)—(Substituted in revision for NRS 280A.080)

* * *

PROCEDURES FOR AUTHORIZATION OF PLANNED DEVELOPMENT

General Provisions

NRS 278A.430 Applicability and purposes of NRS 278A.440 to 278A.590, inclusive. In order to provide an expeditious method for processing a plan for a planned unit development under the terms of an ordinance enacted pursuant to the powers granted under this chapter, and to avoid the delay and uncertainty which would arise if it were necessary to secure approval by a multiplicity of local procedures of a plat or subdivision or resubdivision, as well as approval of a change in the zoning regulations otherwise applicable to the property, it is hereby declared to be in the public interest that all procedures with respect to the approval or disapproval of a planned unit development and its continuing administration must be consistent with the provisions set out in NRS 278A.440 to 278A.590, inclusive.

(Added to NRS by 1973, 571; A 1981, 137)

Proceedings for Tentative Approval

NRS 278A.440 Application to be filed by landowner. An application for tentative approval of the plan for a planned unit development must be filed by or on behalf of the landowner.

(Added to NRS by 1973, 571; A 1981, 137)

NRS 278A.450 Application: Form; filing fees; place of filing; tentative map.

1. The ordinance enacted pursuant to this chapter must designate the form of the application

for tentative approval, the fee for filing the application and the official of the city or county with whom the application is to be filed.

2. The application for tentative approval may include a tentative map. If a tentative map is included, tentative approval may not be granted pursuant to NRS 278A.490 until the tentative map has been submitted for review and comment by the agencies specified in NRS 278.335.

(Added to NRS by 1973, 571; A 1981, 1317; 1987, 664)

NRS 278A.460 Planning, zoning and subdivisions determined by city or county. All planning, zoning and subdivision matters relating to the platting, use and development of the planned unit development and subsequent modifications of the regulations relating thereto to the extent modification is vested in the city or county, must be determined and established by the city or county.

(Added to NRS by 1973, 572; A 1981, 138)

NRS 278A.470 Application: Contents. The ordinance may require such information in the application as is reasonably necessary to disclose to the city or county:

1. The location and size of the site and the nature of the landowner's interest in the land proposed to be developed.

2. The density of land use to be allocated to parts of the site to be developed.

3. The location and size of any common open space and the form of organization proposed to own and maintain any common open space.

4. The use and the approximate height, bulk and location of buildings and other structures.

5. The ratio of residential to nonresidential use.

6. The feasibility of proposals for disposition of sanitary waste and storm water.

7. The substance of covenants, grants or easements or other restrictions proposed to be imposed upon the use of the land, buildings and structures, including proposed easements or grants for public utilities.

8. The provisions for parking of vehicles and the location and width of proposed streets and public ways.

9. The required modifications in the municipal land use regulations otherwise applicable to the subject property.

10. In the case of plans which call for development over a period of years, a schedule showing the proposed times within which applications for final approval of all sections of the planned unit development are intended to be filed.

(Added to NRS by 1973, 572; A 1977, 1523; 1981, 138)

NRS 278A.480 Public hearing: Notice; time limited for concluding hearing; extension of time.

1. After the filing of an application pursuant to NRS 278A.440 to 278A.470, inclusive, a public hearing on the application shall be held by the city or county, public notice of which shall be given in the manner prescribed by law for hearings on amendments to a zoning ordinance.

2. The city or county may continue the hearing from time to time and may refer the matter to the planning staff for a further report, but the public hearing or hearings shall be concluded within 60 days after the date of the first public hearing unless the landowner consents in writing to an extension of the time within which the hearings shall be concluded.

(Added to NRS by 1973, 572; A 1977, 1524)—(Substituted in revision for NRS 280A.460)

NRS 278A.490 Grant, denial or conditioning of tentative approval by minute order; specifications for final approval. The city or county shall, following the conclusion of the public hearing provided for in NRS 278A.480, by minute action:

1. Grant tentative approval of the plan as submitted;

2. Grant tentative approval subject to specified conditions not included in the plan as submitted; or

3. Deny tentative approval to the plan.

➥ If tentative approval is granted, with regard to the plan as submitted or with regard to the plan with conditions, the city or county shall, as part of its action, specify the drawings, specifications and form of performance bond that shall accompany an application for final approval.

(Added to NRS by 1973, 572; A 1977, 1524)—(Substituted in revision for NRS 280A.470)

NRS 278A.500 Minute order: Findings of fact required. The grant or denial of tentative approval by minute action must set forth the reasons for the

grant, with or without conditions, or for the denial, and the minutes must set forth with particularity in what respects the plan would or would not be in the public interest, including but not limited to findings on the following:

1. In what respects the plan is or is not consistent with the statement of objectives of a planned unit development.

2. The extent to which the plan departs from zoning and subdivision regulations otherwise applicable to the property, including but not limited to density, bulk and use, and the reasons why these departures are or are not deemed to be in the public interest.

3. The ratio of residential to nonresidential use in the planned unit development.

4. The purpose, location and amount of the common open space in the planned unit development, the reliability of the proposals for maintenance and conservation of the common open space, and the adequacy or inadequacy of the amount and purpose of the common open space as related to the proposed density and type of residential development.

5. The physical design of the plan and the manner in which the design does or does not make adequate provision for public services, provide adequate control over vehicular traffic, and further the amenities of light and air, recreation and visual enjoyment.

6. The relationship, beneficial or adverse, of the proposed planned unit development to the neighborhood in which it is proposed to be established.

7. In the case of a plan which proposes development over a period of years, the sufficiency of the terms and conditions intended to protect the interests of the public, residents and owners of the planned unit development in the integrity of the plan.

(Added to NRS by 1973, 573; A 1981, 138)

NRS 278A.510 Minute order: Specification of time for filing application for final approval. Unless the time is specified in an agreement entered into pursuant to NRS 278.0201, if a plan is granted tentative approval, with or without conditions, the city or county shall set forth, in the minute action, the time within which an application for final approval of the plan must be filed or, in the case of a plan which provides for development over a period of years, the periods within which application for final approval of each part thereof must be filed.

(Added to NRS by 1973, 573; A 1985, 2116; 1987, 1305)

NRS 278A.520 Mailing of minute order to landowner; status of plan after tentative approval; revocation of tentative approval.

1. A copy of the minutes must be mailed to the landowner.

2. Tentative approval of a plan does not qualify a plat of the planned unit development for recording or authorize development or the issuance of any building permits. A plan which has been given tentative approval as submitted, or which has been given tentative approval with conditions which have been accepted by the landowner, may not be modified, revoked or otherwise impaired by action of

the city or county pending an application for final approval, without the consent of the landowner. Impairment by action of the city or county is not stayed if an application for final approval has not been filed, or in the case of development over a period of years applications for approval of the several parts have not been filed, within the time specified in the minutes granting tentative approval.

3. The tentative approval must be revoked and the portion of the area included in the plan for which final approval has not been given is subject to local ordinances if:

(a) The landowner elects to abandon the plan or any part thereof, and so notifies the city or county in writing; or

(b) The landowner fails to file application for the final approval within the required time.

(Added to NRS by 1973, 574; A 1977, 1525; 1981, 139)

PROCEEDINGS FOR FINAL APPROVAL

NRS 278A.530 Application for final approval; public hearing not required if substantial compliance with plan tentatively approved.

1. An application for final approval may be for all the land included in a plan or to the extent set forth in the tentative approval for a section thereof. The application must be made to the city or county within the time specified by the minutes granting tentative approval.

2. The application must include such maps, drawings, specifications, covenants, easements, conditions and form of performance bond as were set

forth in the minutes at the time of the tentative approval and a final map if required by the provisions of NRS 278.010 to 278.630, inclusive.

3. A public hearing on an application for final approval of the plan, or any part thereof, is not required if the plan, or any part thereof, submitted for final approval is in substantial compliance with the plan which has been given tentative approval.

(Added to NRS by 1973, 574; A 1981, 1317; 1989, 934)

NRS 278A.540 What constitutes substantial compliance with plan tentatively approved. The plan submitted for final approval is in substantial compliance with the plan previously given tentative approval if any modification by the landowner of the plan as tentatively approved does not:

1. Vary the proposed gross residential density or intensity of use;

2. Vary the proposed ratio of residential to nonresidential use;

3. Involve a reduction of the area set aside for common open space or the substantial relocation of such area;

4. Substantially increase the floor area proposed for nonresidential use; or

5. Substantially increase the total ground areas covered by buildings or involve a substantial change in the height of buildings.

➥ A public hearing need not be held to consider modifications in the location and design of streets or

facilities for water and for disposal of storm water and sanitary sewage.

(Added to NRS by 1973, 574; A 1977, 1525; 1981, 139)

NRS 278A.550 Plan not in substantial compliance: Alternative procedures; public hearing; final action.

1. If the plan, as submitted for final approval, is not in substantial compliance with the plan as given tentative approval, the city or county shall, within 30 days of the date of the filing of the application for final approval, notify the landowner in writing, setting forth the particular ways in which the plan is not in substantial compliance.

2. The landowner may:

(a) Treat such notification as a denial of final approval;

(b) Refile his or her plan in a form which is in substantial compliance with the plan as tentatively approved; or

(c) File a written request with the city or county that it hold a public hearing on his or her application for final approval.

➥ If the landowner elects the alternatives set out in paragraph (b) or (c) above, the landowner may refile his or her plan or file a request for a public hearing, as the case may be, on or before the last day of the time within which the landowner was authorized by the minutes granting tentative approval to file for final approval, or 30 days from the date he or she receives notice of such refusal, whichever is the later.

3. Any such public hearing shall be held within 30 days after request for the hearing is made by the landowner, and notice thereof shall be given and hearings shall be conducted in the manner prescribed in NRS 278A.480.

4. Within 20 days after the conclusion of the hearing, the city or county shall, by minute action, either grant final approval to the plan or deny final approval to the plan. The grant or denial of final approval of the plan shall, in cases arising under this section, contain the matters required with respect to an application for tentative approval by NRS 278A.500.

(Added to NRS by 1973, 575)—(Substituted in revision for NRS 280A.540)

NRS 278A.560 Action brought upon failure of city or county to grant or deny final approval. If the city or county fails to act either by grant or denial of final approval of the plan within the time prescribed, the landowner may, after 30 days' written notice to the city or county, file a complaint in the district court in and for the appropriate county.

(Added to NRS by 1973, 576)—(Substituted in revision for NRS 280A.550)

NRS 278A.570 Certification and recordation of plan; effect of recordation; modification of approved plan; fees of county recorder.

1. A plan which has been given final approval by the city or county, must be certified without delay by the city or county and filed of record in the office of the appropriate county recorder before any

development occurs in accordance with that plan. A county recorder shall not file for record any final plan unless it includes:

(a) A final map of the entire final plan or an identifiable phase of the final plan if required by the provisions of NRS 278.010 to 278.630, inclusive;

(b) The certifications required pursuant to NRS 116.2109; and

(c) The same certificates of approval as are required under NRS 278.377 or evidence that:

(1) The approvals were requested more than 30 days before the date on which the request for filing is made; and

(2) The agency has not refused its approval.

2. Except as otherwise provided in this subsection, after the plan is recorded, the zoning and subdivision regulations otherwise applicable to the land included in the plan cease to apply. If the development is completed in identifiable phases, then each phase can be recorded. The zoning and subdivision regulations cease to apply after the recordation of each phase to the extent necessary to allow development of that phase.

3. Pending completion of the planned unit development, or of the part that has been finally approved, no modification of the provisions of the plan, or any part finally approved, may be made, nor may it be impaired by any act of the city or county except with the consent of the landowner.

4. For the recording or filing of any final map, plat or plan, the county recorder shall collect a fee of $50 for the first sheet of the map, plat or plan plus

$10 for each additional sheet. The fee must be deposited in the general fund of the county where it is collected.

(Added to NRS by 1973, 576; A 1975, 1425; 1977, 1525; 1981, 1318; 1989, 934; 1991, 48, 586; 2001, 3220)

NRS 278A.580 Rezoning and resubdivision required for further development upon abandonment of or failure to carry out approved plan. No further development may take place on the property included in the plan until the property is resubdivided and is reclassified by an enactment of an amendment to the zoning ordinance if:

1. The plan, or a section thereof, is given approval and, thereafter, the landowner abandons the plan or the section thereof as finally approved and gives written notification thereof to the city or county; or

2. The landowner fails to carry out the planned unit development within the specified period of time after the final approval has been granted.

(Added to NRS by 1973, 576; A 1977, 1526; 1981, 140)

JUDICIAL REVIEW

NRS 278A.590 Decisions subject to review; limitation on time for commencement of action or proceeding.

1. Any decision of the city or county under this chapter granting or denying tentative or final approval of the plan or authorizing or refusing to authorize a modification in a plan is a final

administrative decision and is subject to judicial review in properly presented cases.

2. No action or proceeding may be commenced for the purpose of seeking judicial relief or review from or with respect to any final action, decision or order of any city, county or other governing body authorized by this chapter unless the action or proceeding is commenced within 25 days after the date of filing of notice of the final action, decision or order with the clerk or secretary of the governing body.

(Added to NRS by 1973, 576; A 1991, 49)

SPARKS CITY CHARTER

http://www.leg.state.nv.us/Division/Legal/LawLibrary/CityCharters/CtySCC.html

* * *

Sec. 1.060 Elective officers: Qualifications; salaries.

1. The elective officers of the City consist of:

(a) A Mayor.

(b) Five members of the Council.

(c) A City Attorney.

(d) Municipal Judges, the number to be determined pursuant to section 4.010.

2. All elective officers of the City must be:

(a) Bona fide residents of the City for at least 30 days immediately preceding the last day for filing a declaration of candidacy for such an office.

(b) Residents of the City during their term of office, and, in the case of a member of the Council, a resident of the ward the member represents.

(c) Registered voters within the City.

3. No person may be elected or appointed as a member of the Council who was not an actual bona fide resident of the ward to be represented by him for a period of at least 30 days immediately preceding the last day for filing a declaration of candidacy for the office, or, in the case of appointment, 30 days immediately preceding the day the office became vacant.

4. The City Attorney must be a licensed member of the State Bar of Nevada.

5. Each elective officer is entitled to receive a salary in an amount fixed by the City Council. At any time before January 1 of the year in which a general election is held, the City Council shall enact an ordinance fixing the initial salary for each elective office for the term beginning on the first Monday following that election. This ordinance may not be amended to increase or decrease the salary for the office of Mayor, City Councilman or City Attorney during the term. If the City Council fails to enact such an ordinance before January 1 of the election year, the succeeding elective officers are entitled to receive the same salaries as their respective predecessors.

(Ch. 470, Stats. 1975 p. 725; A—Ch. 98, Stats. 1977 p. 211; Ch. 380, Stats. 1977 p. 711; Ch. 412, Stats. 1983 p. 1028; Ch. 450, Stats. 1985 p. 1308; Ch. 24, Stats. 1987 p. 59; Ch. 253, Stats. 1989 p. 546; Ch. 129, Stats. 1993 p. 228; Ch. 41, Stats. 2001 p. 394)

* * *

Sec. 2.010 City Council. The legislative power of the City is vested in a City Council consisting of five Councilmen.

(Ch. 470, Stats. 1975 p. 728)

* * *

Sec. 2.070 Ordinances: Passage by bill; amendments; subject matter; title requirements.

1. An ordinance must not be passed except by bill and by a majority vote of the whole City Council. The style of all ordinances must be as follows: "The City Council of the City of Sparks does ordain:".

2. A bill must not contain more than one subject, which must be briefly indicated in the title. Where the subject of the ordinance is not expressed in the title, the bill is void as to the matter not expressed in the title.

3. Any bill which amends an existing ordinance must:

(a) Set out in full the ordinance or sections thereof to be amended;

(b) Indicate any matter to be omitted by lining or striking through it; and

(c) Indicate any new matter by highlighting.

(Ch. 470, Stats. 1975 p. 730; A—Ch. 129, Stats. 1993 p. 230)

Sec. 2.080 Ordinances: Enactment procedure; emergency ordinances.

1. When first proposed, all bills must be read to the City Council by title, after which an adequate number of copies of the proposed bill must be filed with the City Clerk for public inspection. Except as otherwise provided in subsection 3, notice of the filing must be published once in a newspaper qualified to publish legal notices, and published at least 10 days before the adoption of the ordinance.

2. At the next regular meeting or adjourned meeting of the City Council following the proposal of a bill, the title of the bill must be read as first introduced. Thereupon the bill must be finally voted upon or action thereon postponed. The proposed ordinance and any amendments thereto must be read in full when it is adopted only if so requested by a member of the Council.

3. In cases of emergency or where the bill is of a kind specified in section 7.030, by not less than four-fifths of all the members of the City Council, excluding from any such computation any vacancy on the Council, final action may be taken immediately or at a special meeting called for that purpose, and no notice of the filing of the copies of the proposed bill with the City Clerk need be published.

4. All ordinances must be signed by the Mayor, attested by the City Clerk and published by title, together with the names of the members of the Council voting for or against passage, in a newspaper qualified to publish legal notices, and published for at least one publication, before the ordinance becomes effective. The City Council may, by majority vote, order the publication of the ordinance in full in lieu of publication by title only.

5. The City Clerk shall maintain a record of all ordinances together with the affidavits of publication by the publisher.

(Ch. 470, Stats. 1975 p. 730; A—Ch. 380, Stats. 1977 p. 716; Ch. 160, Stats. 1983 p. 373; Ch. 450, Stats. 1985 p. 1314)

SPARKS MUNICIPAL CODE

http://cityofsparks.us/governing/muni_code/

CHAPTER 20.18

PLANNED DEVELOPMENT REVIEW

* * *

Section 20.18.060 Procedure of tentative approval.

A. Staff review. The City staff will formally review the application, and development plan. Staff will evaluate the proposal and submit its recommendation for approval or denial to the Sparks Planning Commission.

B. Public hearing. A public hearing on the application shall be held by the Sparks Planning Commission. No application in tentative approval will be scheduled for consideration before the Planning Commission or City Council if the application contains errata sheets or is missing any of the contents required by 20.18.050 Application contents. Public notice of the hearing shall be given in the manner prescribed by in section 20.07, Administration. The hearing may be continued from time to time or the Planning Commission may refer the matter to the Planning Department for a further report, but the public hearing or hearings shall be concluded within 60 days after the date of the first public hearing unless the landowner consents in writing to an extension of the time within which the hearings shall be concluded.

C. Recommendation to grant, deny, or condition tentative approval. Following the conclusion of the public hearing, the Planning Commission shall recommend:

1. Granting tentative approval of the plan as submitted;

2. Granting tentative approval of the plan subject to specified conditions not included in the plan as submitted; or

3. Denying tentative approval of the plan.

If granting tentative approval is recommended, the Planning Commission shall, as part of its action, specify the drawings, specifications and any special financial assurances that shall accompany an application for final approval.

D. Findings of fact required. The recommendation must set forth the reasons for granting, with or without conditions, or for denying, and the minutes must set forth with particularity in what respects the plan would or would not be in the public interest, including but not limited to findings on the following:

1. In what respects the plan is or is not consistent with the statement of objectives of a planned unit development.

2. The extent to which the plan departs from zoning and subdivision regulations, otherwise applicable to the property, including but not limited to density, bulk and use, and the reasons why these departures are or are not deemed to be in the public interest.

3. The ratio of residential to nonresidential use in the planned unit development.

4. The purpose, location and amount of the common open space in the planned unit development, the reliability of the proposals for maintenance and conservation of the common open space, and the adequacy or inadequacy of the amount and purpose

of the common open space as related to the proposed density and type of residential development.

5. The physical design of the plan and the manner in which the design does or does not make adequate provision for public services and utilities, provide adequate control over vehicular traffic, and further the amenities of light, air, recreation and visual enjoyment.

6. The relationship, beneficial or adverse, of the proposed planned unit development to the neighborhood in which it is, proposed to be established.

7. In the case of a plan which proposes development over a period of years, the sufficiency of the terms and conditions intended to protect the interests of the public, residents and owners of the planned unit development in the integrity of the plan.

E. Specification of time for filing application for final approval. Unless the time is specified in an agreement entered into pursuant to NRS 278.0201, if a plan is recommended for tentative approval, an application for final approval of the plan, or any portion of the plan, must be filed within one year from the date of City Council tentative approval. In no event shall the first application for final approval be filed later than one year from the date of City Council tentative approval unless an alternative time frame is identified in the phasing of the project (item 20.18.040 J, above).

F. The Planning Commission shall file a written report of its recommendation with the City Clerk who shall place it on the agenda of the City Council. The City Council shall:

1. Grant tentative approval of the plan as submitted;

2. Grant tentative approval of the plan subject to specified conditions not included in the plan as submitted; or

3. Deny tentative approval of the plan.

In its grant or denial of tentative approval, the City Council must conduct a hearing and provide findings of fact as delineated in SMC 20.18.060(D).

G. The effect of tentative approval is to provide the applicant with a clear indication of requirements needed for final approval of the development plan including a schedule for submittal of application for final approval. Tentative approval does not qualify a plat or the planned unit development for recording or authorize development or the issuance of any building permit.

(Ord. 2281, Amended, 06/13/2005; Ord. 2129, Add, 02/11/2002)

Section 20.18.070 Final approval application.

An application for final approval is a necessary precursor to the issuance of a permit under SMC chapter 15 for construction activity. An application for final approval must be accompanied by a final development plan, design regulations and a fee in the amount established by resolution of City Council.

(Ord. 2129, Add, 02/11/2002)

Section 20.18.080 Procedure for final approval.

A. Application for final review by the Sparks Planning Commission and ultimate final approval by the Sparks City Council must be made to the Administrator within the time specified by the minutes granting tentative approval.

B. A public hearing on an application for final approval of the plan, or any part thereof, is not required if the plan, or any part thereof, submitted for final approval is in substantial compliance with the plan which has been given tentative approval. No application in final approval will be scheduled for consideration before the Planning Commission or City Council if the application contains errata sheets or is missing any of the contents required by 20.18.050 Application contents. The plan submitted for final approval is in substantial compliance with the plan previously given tentative approval if any modification by the landowner of the plan as tentatively approved does not:

1. Vary the proposed gross residential density or intensity of use;
2. Vary the proposed ratio of residential to nonresidential use;
3. Involve a reduction of the area set aside for common open space or the substantial relocation of such area;
4. Substantially increase the floor area proposed for nonresidential use; or
5. Substantially increase the total ground areas covered by buildings or involve a substantial change in the height of buildings.

A public hearing need not be held to consider modifications in the location and design of streets or facilities for water and for disposal of storm water and sanitary sewage.

C. All requirements and regulations pertaining to the application for final approval, substantial compliance with tentatively approved plan, alternative proceedings for final action on plans not in substantial compliance, recourse to courts for

failure of city to grant or deny final approval, certification and filing of approved plan upon abandonment or failure to carry out approved plan shall be provided in NRS 278A.530 to 278A.580, inclusive.

(Ord. 2281, Amended, 06/13/2005; Ord. 2129, Add, 02/11/2002)

Section 20.18.090 Judicial review. Any decision of the city under this chapter granting or denying tentative or final approval of the plan or authorizing or refusing to authorize a modification in a plan is a final administrative decision and is subject to judicial review in properly presented cases.

(Ord. 2129, Add, 02/11/2002)

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 1 - 2011
OFFICE OF THE CLERK

No. 10-568

IN THE

Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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March 2011

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy and government-reform organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen works for enactment and enforcement of laws fostering an open, accountable, and responsive government and protecting consumers, workers, and the public.

In particular, Public Citizen advocates the enactment and enforcement of laws aimed at protecting the political process from the actual and apparent corruption that may result when private financial interests affect the performance of government officials. Among the types of ethical standards Public Citizen supports for government officials are recusal requirements applicable in instances where a public official has a personal interest that could reasonably be expected to affect his official actions. At the same time, Public Citizen strongly supports the First Amendment rights of those who hold or seek election to public office; thus, for example, Public Citizen filed a brief as amicus curiae in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), supporting the rights of judicial candidates to discuss issues of public importance. Public Citizen believes it is of great importance that the

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[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

Court's resolution of this case affirm the legitimacy of recusal standards that seek to ensure that public officials engage in ethical *conduct* while in office without endorsing undue limits on *speech* by elected officials.

SUMMARY OF ARGUMENT

Laws that require legislators to abstain from voting when they have a conflict of interest are not restrictions on speech. A legislator's authority to vote is not a personal "right," but a power, deriving from his office, to take an official action that helps to determine the government's course of conduct. That taking such action may reveal the legislator's views about the matter being voted on does not render the vote protected speech. This Court has consistently rejected the notion that the First Amendment provides a right to utilize the mechanics of governmental decision-making to convey a personal message. Moreover, legislative voting does not merit First Amendment protection on the theory that its legal force makes it a uniquely definitive form of expression, because the Amendment confers no right to have the government amplify the power of one's speech by attaching legal consequences to it.

The purpose of the recusal requirement in Nevada's Ethics in Government Law is to ensure that governmental decisions are motivated by consideration of the public's interests rather than officials' private interests. Because Nevada's purpose in deterring biased legislative votes is unrelated to suppressing any expressive message communicated by those votes, the law is subject to the standards set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), for assessing limits on expressive conduct. And as a content-neutral regulation that advances an important state interest

while reaching no further than necessary, Nevada's rule easily satisfies *O'Brien*'s standards.

Some courts, echoed by the dissent below, have held that restrictions on speech by legislators are subject to the balancing test set forth in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), for limits on the speech of government employees. Such a view, although it leads to the same result as application of the *O'Brien* standard in this particular case, fundamentally misapprehends the rationale for the government's heightened power to restrict the speech of its employees, which derives from the need for supervisory control over ministerial agents hired to efficiently implement government programs. Moreover, this approach contravenes numerous holdings by this Court and its repeated admonishments that the functioning of the democratic process depends on elected officials being given the fullest scope to publicly express their views. Consistency with this principle demands that restrictions on actual *speech*—as opposed to the conduct at issue here—by members of legislative bodies be held to the highest level of First Amendment scrutiny.

ARGUMENT

I. Nevada's Recusal Requirement for Public Officials Neither Restricts Speech Nor Unduly Limits Expressive Conduct.

A. Ethical Standards That Require Members of Legislative Bodies to Abstain From Voting Do Not Regulate Speech but Rather the Authority to Perform an Official Act.

1. Rules that require legislators to recuse themselves from voting on matters in which they have a conflict of interest are not restrictions on speech. They are restrictions on a legislator's power to perform an official act with legal force. By casting a vote, a legislator commits her apportioned share of the legislature's power to the passage or defeat of a proposal. A recusal rule in itself does not prevent legislators from saying anything about their views, and neither directs legislators to vote nor prohibits them from voting in a particular way. Recusal requirements do not concern the content of expression, but merely determine whether individual legislators are qualified to vote, based on financial or personal interests that indicate a potential for bias. *See* Nev. Rev. Stat. § 281A.420(2) (2007).[2] That legislative voting is fundamentally an act of governance is illustrated by its rec-

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[2] In addition to its recusal requirement, Nevada's statute directs that public officers shall not "advocate the passage or failure of, but may otherwise participate in the consideration of" matters in which they have a conflict of interest. Nev. Rev. Stat. § 281A.420(2). This clause is not at issue here: respondent Carrigan was censured solely for casting a vote. Pet. App. 4a-5a, 41a, 47a-48a.

ognition as an "official act" under federal statutory law[3] and a "legislative act" under federal constitutional law.[4]

Although this Court has never decided the issue, members of the Court have recognized that legislative voting is official conduct, not speech. In *Spallone v. United States*, 493 U.S. 265 (1990), for example, Justice Brennan, joined by three other members of the Court, emphatically rejected the contention that legislative voting is a protected form of speech. In *Spallone*, a federal district court had imposed sanctions on Yonkers city council members in response to the council's failure to enact an ordinance that was required by an earlier consent decree entered into by the city. The council members argued that by compelling them to vote in favor of specific legislation, the sanctions infringed their rights to freedom of speech under the First Amendment. *Id.* at 274.

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[3] The federal statute that prohibits bribery and gratuities to influence any "official act" defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). Legislative voting falls within this definition. *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 908 (2010) (explaining that campaign contributions made under a *quid pro quo* arrangement to secure political benefits "would be covered by bribery laws, *see, e.g.*, 18 U.S.C. § 201").

[4] For Speech or Debate Clause purposes, "[a] legislative act has consistently been defined as an act generally done in Congress in relation to the business before it." *United States v. Brewster*, 408 U.S. 501, 512 (1972). Naturally, this business includes "the act of voting." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (addressing range of Speech or Debate Clause).

While the majority of the Court found it unnecessary to reach that question, the dissent rejected the council members' argument:

> Petitioner Chema claims that his legislative discretion is protected by the First Amendment as well. Characterizing his vote on proposed legislation as core political speech, he contends that the Order infringes his right to communicate with his constituents through his vote. This attempt to recharacterize the common-law legislative immunity doctrine into traditional First Amendment terms is unpersuasive. While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance.

Id. at 302 n.12 (Brennan, J., dissenting). Nothing in the majority's opinion in *Spallone* was to the contrary.

Similarly, in *Doe v. Reed*, 130 S. Ct. 2811 (2010), Justice Scalia—again without contradiction from the majority—expressed the view that legislative voting is not speech. The question in *Reed* was whether public disclosure of the identities of voters who signed petitions to place a referendum on a ballot would violate a claimed First Amendment right to engage in anonymous political speech. Justice Scalia, concurring in the Court's judgment that there was no First Amendment violation, analogized a voter's signature on a petition to a legislator's vote, which he saw as an official action, not as protected speech. Justice Scalia regarded petition-signing as outside the scope of the First Amendment precisely because he viewed it as legislative act: "A voter who signs a referendum petition is therefore exercising legislative power because

his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue." *Id.* at 2833 (Scalia, J., concurring in the judgment).

The majority in *Reed* disagreed with the analogy between legislating and petitioning, *id.* at 2818, but did not contest the premise that legislative action is not protected speech. The Court instead viewed citizen petitioning, unlike legislative voting, as a core form of political expression. *See id.; see also id.* at 2830 (Stevens, J., concurring in part and concurring in the judgment); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"). The Court reasoned that by *adding* potential legally operative effect to this form of First Amendment protected speech, the state had not deprived it of protection:

> It is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment.

Reed, 130 S. Ct. at 2818; *see also id.* ("Petition signing *remains* expressive even when it has legal effect in the electoral process.") (emphasis added).

It is one thing, however, to say that *adding* potential legal effect to a form of expression already recognized to have First Amendment protection does not *deprive* it of protection, and another thing altogether

to suggest that an action, such as legislative voting, that is defined by, and indeed exists only because of, its legally operative effect as an exercise of official authority is First Amendment expression in the first place. Nothing in the *Reed* majority opinion suggests that legislative voting would receive the same protection as a citizen petition. Indeed, *Reed*'s assertion that petition signing "remains expressive *even when* it has legal effect in the electoral process," *id.* (emphasis added), is a recognition that legally operative official acts performed as part of the governmental decision-making process are presumptively *not* speech under the First Amendment.[5]

2. Claiming a First Amendment right to vote on every matter before the Sparks city council, Carrigan emphasizes that voting not only generates legal consequences but also signals a legislator's views about the matter being voted upon. *See* Resp. Cert. Opp. 8. Carrigan's argument boils down to a claim that the First Amendment entitles him to take legally operative official acts because performing those acts provides him with an opportunity to communicate his views. This Court, however, has rejected the notion

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[5] That voting is often accomplished by uttering words does not of course mean that restrictions on voting are restrictions on speech. Prohibitions on conduct are not speech restrictions merely because they entail a limit on the use of speech to effectuate that conduct. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

that the First Amendment provides a right to utilize the mechanics of governance to convey a message.

For instance, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Court considered Minnesota's ban on "fusion" candidacies, which prohibited candidates from appearing on the ballot as the candidate of more than one party. The respondent argued that the fusion ban violated its First Amendment associational rights by burdening its "right ... to communicate its choice of nominees on the ballot on terms equal to those offered other parties, and the right of the party's supporters and other voters to receive that information." *Id.* at 362. The Court was "unpersuaded ... by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363. Similarly, even if the act of publicly voting on legislation contains a communicative element, "the act is quintessentially one of governance," *Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting), and accordingly, is not speech protected by the First Amendment.

Earlier, in *Burdick v. Takushi*, 504 U.S. 428 (1992), on which *Timmons* relied, the Court upheld a state ban on write-in voting against a voter's First Amendment challenge. The voter argued that the prohibition "deprive[d] him of the opportunity to cast a meaningful ballot, condition[ed] his electoral participation upon the waiver of his First Amendment right to remain free from espousing positions that he does not support, and discriminate[d] against him based on the content of the message he [sought] to

convey through his vote." *Id.* at 437-38. The Court disagreed, finding the voter's argument to be based on a "flawed premise[]." *Id.* at 438. As the Court explained, "the function of the election process is to winnow out and finally reject all but the chosen candidates .... Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* (internal quotation marks omitted).

Similarly, the function of the legislative voting process is to accept or reject proposed courses of state action. That legislative voting also has the effect of registering a legislator's "will, preference, or choice," Resp. Cert. Opp. 8 (quoting *Clarke v. United States*, 886 F.2d 404, 411 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990)), does not change its fundamental character as official conduct. The First Amendment therefore confers no right to employ this particular method of registering one's preference. Ascribing a generalized expressive function to legislative voting—thus creating a First Amendment right of officials to vote on every matter before them—would both contravene the reasoning of *Timmons* and *Burdick* and interfere with the states' ability to reduce bias and corruption through ethical standards designed to ensure that officials cast their votes based solely on public considerations.

3. Some courts and commentators that regard legislative voting as protected speech suggest that voting possesses value as speech precisely because its binding legal force makes it a uniquely powerful and definitive form of expression, one that signals devotion to a viewpoint with a strength that speech alone cannot sufficiently convey. *See, e.g.*, *Miller v. Town of Hull*,

878 F.2d 523, 532 (1st Cir. 1989); *Clarke*, 886 F.2d at 411; Steven N. Sherr, *Note, Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 YALE L.J. 233, 242 (1991). Such reasoning conflicts starkly with the Court's precedents, which hold that the First Amendment provides no right to use the mechanisms of governmental decision-making as "forums for political expression," *Timmons*, 520 U.S. at 363, or to serve "a more generalized expressive function," *Burdick*, 504 U.S. at 438, and thus foreclose any argument that a particular citizen is entitled to have the power of his speech amplified over that of others by the government's attachment of legal consequences to it that make the speech appear more definitive or sincere.

To regard legislative voting as speech would afford members of legislatures greater First Amendment rights than ordinary citizens. *See Clarke*, 886 F.2d at 410 ("Congress ... must respect the broad First Amendment rights that the Council members enjoy *by virtue of their status as legislators*.") (emphasis added). The argument implies that legislators, by virtue of their offices, possess not only the right to express their views that all citizens enjoy, but also a constitutionally based entitlement to have the power of that expression enhanced by the addition of a nonspeech element: the legal force that makes voting a "more definite expression of opinion" than any other form of communication. *Miller*, 878 F.2d at 532. But a legislator's power to cast votes derives from his or her status as an elected official. The Court should reject the argument that the First Amendment transforms that power into a personal constitutional right.

B. Nevada's Recusal Requirement Is Unrelated to the Suppression of Expression and Satisfies the *O'Brien* Test for Limits on Expressive Conduct.

1. To the extent that rules disqualifying legislators from voting on particular matters because of personal or financial interests are subject to any First Amendment review, they should be analyzed as restrictions on conduct that incidentally affect the expression ancillary to that conduct. The Court has acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). However, "the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Id.* at 406. Conduct with an expressive component does not enjoy the same level of protection as speech, *see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (citing *O'Brien*, 391 U.S. at 376-77), because permissible regulations on expressive conduct target the effects of the conduct, not the effects of the message expressed through that conduct. That is, conduct with an expressive element "can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992).

Since *United States v. O'Brien*, the Court has applied a relaxed form of First Amendment scrutiny to

prohibitions on conduct that incidentally affect expression. The *O'Brien* standard requires a lesser showing from the state than that required for laws that prohibit speech, but it ensures that the restriction genuinely regulates conduct rather than speech. Thus, whether the *O'Brien* standard applies hinges at the outset on whether a prohibition is designed to suppress expression. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *accord Johnson*, 491 U.S. at 403. If not, *O'Brien* affirms the constitutionality of a conduct regulation if it satisfies a four-part standard:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

Because Nevada has a legitimate purpose for deterring self-interested votes from being cast, and because that purpose is unrelated to suppressing the votes' expressive component, the recusal provision is a regulation of conduct subject to the *O'Brien* standard. Specifically, Nevada's recusal rule seeks to ensure that governmental decisions result from consideration of the public's interests rather than officials' private interests. Carrigan was censured for the conduct of casting a legally operative vote, not for the vote's expressive message. The recusal requirement affects only the authority to vote, not what the official may say in speeches or campaign ads, for example. That is,

Carrigan was censured not for expressing an opinion but for acting to authorize a proposal. *See O'Brien*, 391 U.S. at 382 ("For this noncommunicative impact of his conduct, and for nothing else, he was convicted.").

Just as a statute's overly broad scope can reveal that it is aimed at expression as well as behavior, a selective scope can reveal that its true target is the expressive content of that behavior, *e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969) (noting that "school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance," but merely armbands in protest of the Vietnam War), or that it impermissibly exempts favored content from its purview, *e.g.*, *Carey v. Brown*, 447 U.S. 455 (1980) (striking down ban on residential picketing that exempted labor picketing). Nevada's recusal provision has no such flaw. The provision does not penalize legislators for voting one way but exempt them if they vote another way. Instead it requires them to abstain, no matter how they would vote, if a private interest in the matter is reasonably likely to affect the independence of their judgment. *See* Nev. Rev. Stat. § 281A.420(2). The imperative to abstain is thus triggered by the official's personal financial interests and relationships, not by the content of the vote he would cast. The recusal requirement is therefore a regulation of conduct unrelated to the suppression of expression and falls squarely within *O'Brien*.[6]

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[6] *See Erie*, 529 U.S. at 293 ("Because this justification was unrelated to the suppression of O'Brien's antiwar message, the regulation was content neutral."); *Clark v. Cmty. for Creative*

(*Footnote continued*)

2. Nevada's recusal requirement easily satisfies *O'Brien*'s four-part test for limits on expressive conduct.

First, the law is within the state's constitutional authority. Nevada surely has the power to establish ethical recusal standards for its elected officials, including municipal officials. *Cf. Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them.... The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.").

Second, the Nevada recusal requirement furthers an important government interest in having members of legislative bodies cast votes based solely on the members' views of the public good, not on private pecuniary interests or personal commitments. "[P]reventing corruption" among elected officials is an interest "of the highest importance." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978).

Even apart from the threat of outright corruption, permitting legislators to cast votes when they have a significant personal stake in the outcome creates a risk of unconscious bias because the legislator's incentives in relation to the matter are divided. Such di-

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Non-Violence, 468 U.S. 288, 295 (1984) ("[T]he prohibition on camping, and on sleeping specifically, is content-neutral and is not being applied because of disagreement with the message presented.").

vided incentives cause a "perversion of the normal legislative process." *Spallone*, 493 U.S. at 279, 280. Nevada's recusal rule seeks to prevent that situation.

Third, Nevada's interests, as discussed above, are unrelated to the suppression of expressive content, and the recusal provision is entirely content neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.") (internal quotation marks omitted).

Carrigan argues that Nevada's statute is content-based "because it is based on relationships or circumstances that, in the Commission's view, influence or motivate elected officials to vote *in a particular way*." Resp. Cert. Opp. 10. This claim is meritless: an official with a conflict of interest who votes "aye" on a matter and an official with a conflict of interest who votes "nay" on the same matter have equally violated the statute. Nor is it the case, as Carrigan argues, that "the practical concern and justification for the abstention requirement is the content of the message conveyed if elected officials were allowed to cast votes that the Commission deemed to be improperly based on particular motivating ideologies or perspectives created by certain relationships." *Id.* The concern of the statute is not the "message" sent by improperly motivated votes, but the damaging impact on the public welfare of governmental action that is or appears to be based on private interests.[7]

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[7] To be sure, the prohibition itself may send a message that allowing improperly motivated votes is undesirable, just as laws against other illegal conduct send a message that society does not

(*Footnote continued*)

The recusal requirement, moreover, is manifestly not aimed at "ideologies or perspectives." *Id.* It does not, for example, prevent a legislator from voting on a project such as the "Lazy 8" based upon his or her views—one way or the other, and however formed—on the economic benefits or morality of such projects, or the desirability of conferring a benefit on the particular private interests who stand to gain or lose from approval or disapproval of the project. The statute does not address any "perspectives" on what is best for the community, but only votes that may be motivated by personal commitments, not community interests.

Moreover, Nevada's statute prohibits a legislator from voting on a matter in which he has a private interest whether or not the legislator votes in furtherance of that interest. It is not difficult to imagine situations where a legislator's vote *against* his private interests would be improperly influenced by the existence of those interests. For example, if it were known that an official had a personal stake in the passage of a matter such as the Lazy 8 proposal, that official might be motivated to vote against his own personal interest to avoid the appearance of corruption, make a showing of independence, and deprive his future opponents of a potent campaign issue. Faced with such considerations, the legislator might vote against the proposal, despite believing that it would benefit the public. The independence of his judgment would be

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tolerate such conduct. But Carrigan has not claimed, nor could he, that the State of Nevada lacks a right to convey such a message.

materially affected by his private interests, although he opted to vote against rather than with them.

Finally, *O'Brien*'s fourth requirement is met because the recusal requirement's incidental constraint on First Amendment expression is no greater than necessary to further Nevada's interests. This step in the *O'Brien* analysis does not require the state to "narrowly tailor" the means for achieving its end. "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Here, Nevada's recusal requirement addresses the precise concern that motivates the law and goes no further. The purpose of the ethics statute is to prevent government policy from being decided on the basis of officials' personal interests. Requiring legislators to abstain from voting where they have a conflict of interest—as opposed to merely disclosing that interest—is necessary to the statute's goals. While disclosure has value in informing voters' choices, it does not prevent the legal consequences of a biased legislative act. Recusal rules are necessary to fully vindicate the state's interest, and, again, the recusal requirement does not prevent the expression of legislators' views through other means. The provision therefore causes no greater incidental limit on expression than necessary to achieve its conduct-oriented goals.

II. ACTUAL SPEECH BY LEGISLATORS DESERVES THE HIGHEST LEVEL OF FIRST AMENDMENT PROTECTION.

Recognizing that ethical restrictions on the eligibility of representatives to vote are not limits on speech facilitates protection of the legislative process without improperly endorsing restrictions on legislators when they do engage in protected speech. By contrast, some courts have affirmed voting limits on a rationale that would do fundamental damage to the First Amendment by holding that restrictions on speech by legislators are subject to the balancing test set forth in *Pickering*, 391 U.S. at 568, for restrictions on the speech of government employees.[8] The implication is that the state may restrict the speech of legislative officials under a more lenient standard than when it restricts the speech of ordinary citizens. These decisions fundamentally misapprehend the rationale for the government's heightened power to restrict the speech of its employees. Furthermore, they ignore the import of holdings by this Court making clear that the robust functioning of the democratic system requires that elected officials be given the fullest scope to express their views publicly.

A. *Pickering* held that although the government lacks *carte blanche* to condition public employment on surrender of individual constitutional rights, 391 U.S. at 568, government employees relinquish some of the speech rights they enjoy as citizens. They may be penalized for speaking as employees on matters unre-

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[8] *E.g.*, *Camacho v. Brandon*, 317 F.3d 153 (2d Cir. 2003); *Mullin v. Town of Fairhaven*, 284 F.3d 31 (1st Cir. 2002); *DeGrassi v. City of Glendora*, 207 F.3d 636 (9th Cir. 2000).

lated to political, social, or other public affairs because, as the Court later put it, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers*, 461 U.S. 138, 149 (1983). But when an employee speaks as a citizen on matters of public concern, the First Amendment requires a weighing of the interests of employee and employer. "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

As the Court has explained, the government's heightened power to restrict the speech of its employees comes from the nature of the employment relationship and the government's "interests *as an employer* in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* (emphasis added). "[P]ublic employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). The balancing required by *Pickering* "is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment." *Id.*

To ensure "the effective functioning of the public employer," *id.* at 391, "the government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion). These enhanced powers "are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it." *Id.* at 674.

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

Id. at 674-75.

The state's heightened power to restrict the speech of its employees thus reflects "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143. The key consideration in assessing such restrictions is the nexus between the employee's allegedly disruptive speech and the "practical realities involved in the administration of a government office." *Id.* at 154. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). The Court's decisions have consistently grounded the *Pickering* doctrine in

the need to maintain discipline over subordinates and prevent disruption of the workplace.[9]

B. The considerations that animate the *Pickering* line of cases do not apply to elected legislative officials. Legislators are not subordinates hired to carry out tasks in furtherance of policy aims set by others. They do not work under the direction of supervisors who must be assured of control over their actions to guarantee the efficient execution of duties. And their interactions with their colleagues are unlike the working relationships within an office that exists to facilitate the daily provision of government services. Elected legislative officials set government policy, rather than implementing it. Their supervisors are the voters who elect them. And in their interactions with their colleagues and the legislative institution, they are not only permitted but often expected to represent the ideological or partisan views for which they were chosen by the electorate.[10]

Based on their different functions, the Court has distinguished between the First Amendment rights of ministerial government employees and elected officials. In *Wood v. Georgia*, 370 U.S. 375 (1962), the

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[9] *See, e.g., Garcetti*, 547 U.S. at 419; *Waters*, 511 U.S. at 675; *Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 154.

[10] Some local boards and commissions that are made up of elected members and that involve voting may nonetheless be subordinate to the control and policy decisions of higher government bodies. *See, e.g., Velez v. Levy*, 401 F.3d 75, 81 (2d Cir. 2005) (elected community school district board charged to "establish educational policies and objectives, not inconsistent with the provisions of this article and the policies established by the city board"). Members of such subordinate bodies might conceivably be subject to *Pickering*.

Court held that an elected sheriff's First Amendment rights were violated when he was held in contempt for expressing his personal views. Distinguishing the sheriff from a government employee whose political activity could be restricted by laws such as the federal Hatch Act, the Court emphasized the sheriff's elected status:

> Petitioner was not a civil servant, but an elected official, and hence this is not a case like *United Public Workers v. Mitchell*, 330 U.S. 75 [(1947)], in which this Court held that congress has the power to circumscribe the political activities of federal employees in the career public service.

Id. at 395 n.21. As an "elected official," the petitioner "had the right to enter the field of political controversy." *Id.* at 394.

Because of the fundamental difference in position between subordinate employees and the elected officials who establish policy, "there is a meaningful distinction between the First Amendment's protection of public employees' speech and ... that of elected government officials." *Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir. 2009), *dismissed as moot*, 584 F.3d 206 (5th Cir. 2009). "None of [this] Court's public employee speech decisions qualifies or limits the First Amendment's protection of elected government officials' speech." *Id.* at 523.

C. Stretching *Pickering*'s limits on public employee speech to afford less protection to speech by elected officials than to ordinary citizens would undermine the vitality of the democratic system by preventing legislators from communicating their views to the public. *Bond v. Floyd*, 385 U.S. 116 (1966), is the Court's most thorough examination of this point.

Bond arose when the Georgia House of Representatives resolved not to seat Julian Bond because of comments he and an organization with which he was affiliated had made about the Vietnam War. *Id.* at 117-26. Defending Bond's exclusion, Georgia did not argue that Bond's remarks violated any laws, or that an ordinary citizen could be penalized for speaking them. *Id.* at 132. Rather, the state claimed that it "may nonetheless apply a stricter standard to its legislators," *id.* at 133, because they are required to adhere to a unique oath of loyalty and "because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government." *Id.* at 136. The Court found "no support" for these arguments, stating that "[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators," *id.*, and holding that Bond's disqualification violated the First Amendment.

Bond established that legislators enjoy the same First Amendment rights as ordinary citizens, and that the responsibilities of their positions do not enable the state to penalize them for expressing their views. It further affirmed that restricting the speech of elected representatives would be especially pernicious because "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Id.* at 135-36.[11]

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[11] *Bond* also illustrates another important point: Even though legislative voting is not itself speech and a limitation on voting is thus not a direct restriction of speech, preventing a leg-

(*Footnote continued*)

Before *Bond*, the Court had already lauded the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In limiting the state's ability to penalize even false statements on public matters, the Court had explained that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The Court had also rejected the contention that the "right to freedom of expression" of a local elected official could "be more severely curtailed than that of an average citizen." *Wood*, 370 U.S. at 393. "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.* at 395.

The Court's decisions have consistently reflected the importance of protecting the unfettered flow of speech by elected officials. Limiting their speech not only threatens the harms associated with any speech restriction, but also impairs the right of members of the public to choose representatives that share their views. The *Pickering* test has no place here because speech by elected members of legislative bodies deserves the full degree of First Amendment protection.

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islator from voting in *retaliation* for speaking would violate the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted,

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NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE STUDENT PRESS LAW CENTER AND 14 OTHER NEWS ORGANIZATIONS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici (described in Appendix A) and the journalists that they represent have an interest in protecting the public's right to freely monitor and oversee the ethical and open workings of its government. Equating acts of governance by elected officials to pure political speech that is protected by the First Amendment strict scrutiny standard may significantly compromise the ability of the press to monitor and inform the public of the actions taken by representatives in their official capacity. *Amici* file this brief to emphasize the dangers that the adoption of the Nevada Supreme Court's reasoning in this case could pose to open government.

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[1] Pursuant to Supreme Court Rule 37 (2010), counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; and that counsel for the petitioner and respondent have filed blanket written consents to the filing of *amicus curiae* briefs in this matter.

SUMMARY OF ARGUMENT

Interpreting acts of governance, such as voting by public officials, as pure political speech protected by the strict scrutiny review standard carries "broad implications." *See Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) (en banc). They extend beyond conflict of interest regulations to also reach other ethics and open government laws, where the ramifications are undoubtedly real and significant.

As members of the media constitutionally charged with holding government accountable to the people, *amici* urge this Court to consider Respondent's First Amendment claim within the broader context of traditional government measures designed to promote open and honest governing. Neither history nor practice suggests that a constitutional amendment "[p]remised on mistrust of government power," *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010), is meant to be a vehicle for government officials to avoid compliance with content neutral ethics and open government laws.

This Court should hold that recusal statutes and other generally applicable and evenhanded regulations on acts of governance do not qualify as restrictions on political speech that are subject to strict scrutiny under the First Amendment. An official government action, such as the casting of a legislative vote, certainly may include an expressive component. But that fact does not mean that voting and other actions taken by elected officials in their official capacities implicate the type of expression that the First Amendment's Free Speech Clause was

"meant to protect." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Moreover, even if an elected official's vote is considered protected political expression, strict scrutiny remains inappropriate here. Recusal statutes like Nevada's, which regulate the mechanics of local government, are not attempts to stifle expression. The secondary effect that recusal regulations may have on such expression is modest and is justified by legitimate governmental interests that are "unrelated to First Amendment values." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

ARGUMENT

I. Finding a Strict Scrutiny Standard of Review Applicable in this Case Could Fatally Expose a Variety of Open Government and Ethics Laws to Constitutional Challenges

Amici, as independent monitors of government affairs, are naturally concerned about the potential impact on government openness if this Court were to establish a strict scrutiny standard of review in cases involving government officials' freedom to "speak"[2] or otherwise associate in any First Amendment sense. One means of ensuring accountable and ethical government conduct is through state and federal Sunshine laws that require government officials to hold all deliberations and voting on matters coming before their respective bodies in public. Another is the myriad of state and federal ethics laws that govern the conduct of legislative, executive and judicial branch figures. These can range from laws forbidding associations that raise an appearance of impropriety to

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[2] For purposes of the arguments raised in Section I herein, *amici* assume *arguendo* that there is no legally significant distinction between a government official's speech and his or her related government action for which the First Amendment would not apply. As set forth in Section II, however, *amici* maintain that the activity at issue in this case – that is, an elected official casting a vote – is not protected private speech but in fact government action that raises no recognizable First Amendment claims. Nonetheless, *amici* highlight herein the potential fallout from a finding that a government official's duties and related actions implicate First Amendment protections.

those that require disclosing actual or perceived conflicts. Indeed, as the Nevada Supreme Court rightfully found in this case, "promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest that is consistent with the public policy rationale behind the Nevada Ethics in Government Law." *Carrigan v. Comm'n on Ethics*, 236 P.3d 616, 623 (Nev. 2010).

Promoting honest and impartial government is surely a compelling state interest and that aspect of a strict scrutiny standard cannot be reasonably assailed. However, certain facets of open meetings and numerous ethics laws could potentially fail the "narrowly tailored" component of such an analysis as they would often be found unconstitutionally vague or overbroad. By their very nature, ethical dilemmas often operate in zones of gray, where clear standards of appropriate behavior are difficult to delineate. Hence, laws intended to curb unethical behavior can be facially read as possibly overinclusive, arbitrary or ill-defined.

Some may well argue that the "limitations" of precise drafting actually further the policies underpinning ethics laws as they may tend to encourage individuals to favor a safe, ethical option in the face of uncertainty. Further, it is often impractical to divine and codify every potential ethical dilemma that could arise, thereby necessitating guidelines based on experience, principle and example rather than rigid, absolute constructions. This rationale is, for example, supported by the Judicial Conference's Code of Conduct for United States Judges (hereinafter,

"Judicial Code of Conduct"), discussed *infra*, which notes in commentary to rules regarding judicial impropriety that "[b]ecause it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not necessarily mentioned in the Code." Code of Conduct for United States Judges, Commentary to Canon 2A (last revised June 30, 2009).[3]

What follows is an illustrative overview of the variety of laws designed to promote ethical and open government that would be susceptible to constitutional challenge should this Court hold that a strict scrutiny analysis applies to any law affecting a government official's "speech" or association rights related to their official actions. The ongoing viability of such laws is of critical importance to *amici* because they help to ensure that the media can effectively report and analyze government activity for the public's benefit.

A. Federal and State Open Meetings Laws

Finding the strict scrutiny standard applicable to restrictions on government officials' "speech" could have fatal implications for state and federal open meetings laws that require government officials forbear from deliberating in private to discuss matters before their respective bodies. As such laws are

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[3] *Available at*: http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf.

worded, government officials could argue that such restrictions are not narrowly tailored in that they often ban a wide swath of communications between officials that relate to or could affect their public voting decisions.

For example, the federal Government in the Sunshine Act, 5 U.S.C. § 552b *et seq.* (hereinafter "Sunshine Act"), states that "every portion of every meeting of an agency shall be open to public observation." 5 U.S.C. § 552b(b) (2010). Subject to a few enumerated exceptions, the act defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ." *Id.* § (a)(2). In short, the law requires agency collegial bodies to deliberate and cast votes in full public view and prevents a quorum of any collegial agency body to deliberate or predetermine agency action. As its legislative history suggests:

> It is not sufficient for the purposes of open government to merely have the public witness final agency votes. The meetings opened by [the Sunshine Act] are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decision-making process, not merely its results, must be exposed to public scrutiny.

S. Rep. No. 94-354, at 18 (1975).

In interpreting the meaning of "meeting" under the Sunshine Act, this Court has noted that potentially illegal private "discussions must be 'sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.'" *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 471 (1984) (quoting R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act 9 (1978)).

States have substantially similar open meetings laws requirements that generally forbid agency body heads, local councilmembers, commissioners, and other like public officials from engaging in private discussions with colleagues on matters pending before the body. For example, Colorado's open meetings law states that "[a]ll meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." Colo. Rev. Stat. § 24-6-402(2)(a) (2010). It goes on to define a "meeting" as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." *Id.* § (1)(b).

Similarly, Kentucky's open meetings laws state that subject to limited exceptions, "[a]ll meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times . . . ." Ky. Rev. Stat. § 61.810(1) (2010). Kentucky defines a

"meeting" under the act as "all gatherings of every kind, including video teleconferences, regardless of where the meeting is held, and whether regular or special and informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting." Ky. Rev. Stat. § 61.805(1) (2010).

It is easy to envision constitutional challenges asserting that laws like those cited above are arbitrary (quorum requirements), overbroad (bans on any discussion of public business or business that may come before a body) or vague (discussions that could reasonably lead to officials forming opinions on pending matters). Yet these laws are in place precisely to stem such activity through relatively broad and far-reaching limitations so as to capture a wide range of potentially unethical behavior without specifically detailing every instance or scenario in which actual ethical breaches will undoubtedly result.

The above concern is not purely supposition. *City of Alpine v. Abbott* is a case currently pending before the U.S. District Court for the Western District of Texas in which local Texas officials are challenging the constitutionality of the state's open meetings laws. *See City of Alpine v. Abbott*, No. 09-CV-00059 (W.D. Tex. filed Dec. 14, 2009). Officials claim that the imposition of criminal penalties for violations of the state act – which include prohibitions on discussing public business in private – infringe on officials' First Amendment rights. If a court were required to analyze Texas' open meetings law "speech" restrictions under strict scrutiny, it may well find that they are not narrowly tailored enough to pass constitutional muster. This would turn the purpose of the

First Amendment, which is designed to protect the people from government, on its head.

B. "Revolving Door" Legislation

Laws designed to prevent conflicts of interest and government-private sector "revolving doors" in legislative and executive branch officials are also potentially at risk of being declared unconstitutional should this Court rule that strict scrutiny applies to restrictions on government officials' speech or freedom to associate in an official capacity. For example, at the federal level, 18 U.S.C. § 207 prevents former executive officials from influencing pending matters in which they participated or were under their responsibility at the time of their government employment. Specifically, the law provides for both permanent and two-year restrictions on certain "communications" or "appearances" by former executive branch officers and employees "knowingly" made with the "intent to influence" current government officials on a particular matter. *See* 18 U.S.C. § 207(a)(1)-(2) (2010). These provisions restrict contact when: (1) the government is a party to or "has a direct and substantial interest" in the matter; (2) the former official had a role in the matter (or in the case of two-year restrictions, matters he or she "knows or reasonably should know was actually pending under his or her official responsibility . . . within a period of one year before the termination of . . . employment"); and (3) specific parties were involved at the time the former official was involved in the matter. *Id.*

Additional one-year restrictions prohibit representing, aiding or advising third parties on trade and treaty negotiations. *Id.* § (b). High-level executive officials and appointees are governed by additional restrictions. *See id.* § (c). The same law imposes similar restrictions on former members of Congress and staffers. *See id.* § (e). The Obama administration has placed further revolving door restrictions on executive agency appointees. *See* Exec. Order No. 13490, 74 Fed. Reg. 4673-78 (Jan. 21, 2009). Similar laws are also in place at the state level across the country. *See, e.g.*, Ala. Code § 36-25-13 (2011); Cal. Gov't Code § 87406 (2010); Mo. Rev. Stat. § 105.454(5)-(6) (2011); N.Y. Pub. Off. Law § 73(8) (2011); Wis. Stat. § 19.45(8) (2010).

There is clearly an interest in preventing government employees from immediately transitioning into the private sector and working on matters for which they had input or responsibility as a government employee. Such rules prevent unfair private sector advantage in the legislative process and diminish the possibility of untoward influence within executive agencies. However, if such laws were subjected to a strict scrutiny standard it could prove difficult to justify the various time restraints imposed under federal law or determine what kinds of communications are knowingly made with the intent to influence – a phrase that could be interpreted as both vague and overbroad. Such prohibitions intended to prevent revolving door practices are by design drafted to be relatively sweeping and open-ended so as to cover the wide variety of speech and association that would frustrate its intent.

C. Judicial Ethics

The federal judiciary is also subject to a variety of ethical rules designed to engender legitimacy in, and respect for, the adjudicative process. The Judicial Code of Conduct places a number of constraints on judges' activities that would arguably implicate a judge's "speech" or association rights under the First Amendment. Failure to abide by such ethical rules could lead to censure, impeachment and ultimately removal from the bench.

Canon 5A, for example, prohibits federal judges from engaging in a variety of core political speech activities including: (1) holding leadership positions in "political" organizations; (2) making speeches on behalf of such organizations; (3) publicly endorsing or opposing a political candidate; and (4) raising money for or contributing to a political organization or candidate. *See* Judicial Code of Conduct, Canon 5A. Canon 4 places even broader restrictions on a judge's extrajudicial activities, prohibiting "activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties [or] reflect adversely on the judge's impartiality . . . ." Judicial Code of Conduct, Canon 4.

Canon 2A goes even further to state simply that judges should "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Judicial Code of Conduct, Canon 2A. The commentary to Canon 2A notes that

judges must avoid any actual impropriety or the appearance of impropriety in both his or her professional and private life. *See id.* It defines an appearance of impropriety as those situations where "reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as judge is impaired." *Id.*

It is clear from the plain language of the code that a judge's ability to speak freely on issues of public concern and associate with any groups or movements regarding such concerns is limited and impinges on many of the freedoms the average citizen can freely exercise. It is arguably unclear what activities may even be subject to such restrictions. As noted in the code itself, however, the Canons eschew narrowly drawn and precise rules of ethics in favor of generally applicable guidelines to ensure the integrity of the judicial system. Hence, they are naturally open ended and sweeping so as to give cover to the variety of situations that may reflect negatively on judicial independence. Like the laws discussed previously, these ethical constraints could risk constitutional challenges should this Court find that restrictions on government officials' "speech" rights are subject to strict scrutiny.

The above is but a representative sampling of the kinds of laws potentially affected by the Court's ruling in this case. Surely there are others. However, those presented here suggest that this case has much greater implications on open government and ethics laws than the single Nevada law at issue. Should

this Court hold that First Amendment protections apply in this case, *amici* respectfully urge this Court to carefully consider the effect establishing a strict scrutiny standard for restrictions on government officials' speech may have on the myriad of laws intended to promote open and honest government.

II. Neither Tradition nor Precedent Supports Applying First Amendment Strict Scrutiny Review to Generally Applicable and Evenhanded Regulations on Acts of Governance

In addition to the significant repercussions on governing that could flow from subjecting traditional open government and ethics laws to strict scrutiny, such an approach also is inconsistent with both the historical purpose of the First Amendment and this Court's practice in other contexts in which content neutral regulations serve a purpose other than the restriction of expression. Accordingly, *amici* urge this Court to hold that open government and ethics statutes that are generally applicable and evenhanded regulations on acts of governance should not be viewed as restrictions on political speech subject to strict scrutiny under the First Amendment.

A. Extending First Amendment Speech Rights to Official Government Actions Is Inconsistent with the Traditional Purpose of the First Amendment

There is a long history of protecting the ability of legislative officials to speak and perform their official

duties. That history, however, suggests that it is the Speech and Debate Clause, U.S. Const. art. I, § 6, and similar state privileges that are intended to protect the official acts of legislators, not the First Amendment, U.S. Const. amend. I.[4]

"Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *accord Spallone v. United States*, 493 U.S. 265, 279 (1990). This "legislative freedom" – which extends to legislative voting, *see, e.g., Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) – was established in multiple State constitutions prior to the ratification of the Federal Constitution, and is traced directly to a similar privilege in Parliament. *Tenney*, 341 U.S. at 372-74. The purpose behind providing legislators with the "fullest liberty of speech" in the exercise of their duties was "to enable and encourage a representative of the public to discharge his public trust with firmness and success." *Id.* at 373 (quoting II Works of James Wilson 38 (Andrews ed. 1896)).

As Justice Pickering noted below, however, this speech protection for lawmakers has traditionally been premised on the U.S. Constitution's Speech and

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[4] *Compare* U.S. Const. art. I, § 6 ("[F]or for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.") *with* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

Debate Clause and state legislative immunity, not the First Amendment. *See Carrigan*, 236 P.3d at 625 (Pickering, J., dissenting) (citation omitted). As reflected in *Tenney* and other cases, the premise of the Speech and Debate Clause and similar state provisions was that protecting the actions of government officials in their legislative capacity would benefit their constituents. *See Tenney*, 341 U.S. at 373-74 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), as explaining the intent of the legislative privilege as being "to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal").

In contrast, the drafting of the First Amendment's Free Speech Clause does not suggest an intent to protect acts *by* government officials, but rather an intent to restrict the government's ability to censor private speech. The First Amendment sprung directly from James Madison's desire to protect individuals from tyranny and government censorship. *See* Raymond Shih Ray Ku, *F(r)ee Expression? Reconciling Copyright and the First Amendment*, 57 Case W. Res. L. Rev. 863, 874 (2007) (observing that the First Amendment was "a direct response to the evils of censorship in England"). Madison's writings consistently indicate that he envisioned the First Amendment to act as a restraint on governmental power; he explicitly claimed that "the amendment is a denial to Congress of all power over the press." James Madison, "Report on the Virginia Resolu-

tions," *Writings 6:385-401* (Jan. 1800).[5] Implicit in the First Amendment is the idea that access to governmental affairs allows the public to better understand its government. Madison, *supra* ("[T]he several amendments proposed were to be considered as . . . extending the ground of public confidence in the Government.").

By imposing restrictions on government censorship, the First Amendment allows the public to speak freely about governmental affairs. As Madison explained, "[A] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both . . . . And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 *Writings of James Madison* 103 (G. Hunt ed., 1910). Madison recognized the importance of having the public know and understand governmental affairs, and he intended that the First Amendment be the tool with which such knowledge could be obtained. 2 T. Cooley, *Constitutional Limitations* 885 (8th ed. 1927), *cited in* R. James Assaf, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 Case W. Res. L. Rev. 227, 251 (1990) ("The evils to be prevented [by the First Amendment] were . . . any action by the government by means of which it might prevent such free and general discussion of public matters.").

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[5] *Available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

This Court has repeatedly embraced Madison's understanding of the First Amendment. In numerous opinions, the Court has acknowledged the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *accord Bellotti*, 435 U.S. at 776-77 (quoting from and reaffirming *Mills*). In acknowledging the protections the First Amendment bestows on the public, Justice Stewart similarly recognized that the First Amendment was expressly not designed to protect the government. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government.") (emphases in original).

This Court has also repeatedly emphasized that the First Amendment was designed to protect the public's access to information about its government. *See, e.g., Bellotti*, 435 U.S. at 783 ("[The] First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw."); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (asserting that the First Amendment had a "purpose of assuring freedom of communication on matters relating to the functioning of government"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that the First Amend-

ment includes an inherent right to acquire and proliferate knowledge and information).

The Court's precedent on this issue illustrates its understanding that the First Amendment was drafted to provide the public with access to the government. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'"). Therefore, the First Amendment cannot be used as a means to *limit* public access to government; doing so would be directly in conflict with the First Amendment's core purpose. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting) ("The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution."); *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised.").

B. The Act of Voting by Elected Officials Does Not Constitute the Type of Expression that Should Be Protected by Strict Scrutiny Review Under the First Amendment

A regulation on the act of voting by elected officials is a regulation on an act of governing, not private speech. The First Amendment's Free Speech Clause was not intended to address such government action. Even if such regulations did affect protected expression, the governmental context and content

neutral nature of the regulations render the strict scrutiny standard inappropriate.

1. An Elected Official's Act of Casting a Vote Is an Act of Governance

When an elected official casts an official vote, the official performs an act of governance. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (stating that a councilmember's "acts of voting for an ordinance were, in form, quintessentially legislative"). As Justice Brennan has said, "[w]hile the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance." *Spallone*, 493 U.S. at 302 n.12 (1990) (Brennan, J., dissenting); *see also Doe v. Reed*, 130 S. Ct. 2811, 2833 (2010) (Scalia, J., concurring in judgment) ("A voter who signs a referendum petition is therefore exercising legislative power because his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue.") (footnote omitted).

Undoubtedly, that official's act may include an expressive component. As the First Circuit stated in *Miller v. Town of Hull*, voting can be a means for lawmakers to express their position to constituents. 878 F.2d 523, 532 (1st Cir. 1989) ("There can be no more definite expression of opinion than by voting on a controversial public issue.") (footnote omitted). Likewise, this Court's case law supports the proposition that the act of voting by private citizens implicates the First Amendment, and that signing a petition in a referendum process is an expression of a political view. *See Reed*, 130 S. Ct. at 2817-18.

But the fact that voting by public officials may include an expressive component does not mean that any regulation on that act "abridges expression that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776. The First Amendment is certainly "meant to protect" the rights of lawmakers to voice their own opinions: a legislative body, for example, generally may not expel an elected member because of the position that member has expressed publicly. *See Bond v. Floyd*, 385 U.S. 116, 135-37 (1966). But regulations on acts of governance – on the lawmaking process itself – are different. They do not punish legislators for expressing their point of view; legislators remain free to voice their opinion as they see fit. *See, e.g., Reed*, 130 S. Ct. at 2830 ("Regardless of whether someone signs a referendum petition, that person remains free to say anything to anyone at any time.") (Stevens, J., concurring in part and in judgment). Instead, recusal requirements generally only restrict the governing act of casting a vote in an official capacity.[6]

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[6] The Eighth Circuit reached a similar conclusion in *Peeper v. Callaway County Ambulance District*, distinguishing between a restriction limiting an official's participation as a local board member and a limitation on participating in a public meeting as a citizen. 122 F.3d 619, 623 n.4 (8th Cir. 1997) (stating that a resolution "does not limit her ability to vote for Board members, to speak before the Board during public comment periods, or to otherwise express her opinions about the District's operation as any other citizen under the First Amendment's free speech guarantee.").

It is in this respect that the limited burden placed on a public official's expression is most apparent. In *Reed*, this Court recognized that a public disclosure requirement on petition signatures could burden speech. 130 S. Ct. at 2817-18. But "'the amount of speech covered' is small – only a single, narrow message conveying one fact in one place." *Reed*, 130 S. Ct. at 2830 (Stevens, J., concurring in part and in judgment) (citation omitted). And while the act of signing a petition – like the act of casting an official vote – "does serve an expressive purpose, the act does not involve any 'interactive communication,' and is 'not principally' a method of 'individual expression of political sentiment.'" *Id.* (citations omitted).

If the "expressive interests implicated by the act of petition signing are always modest," *Reed*, 130 S. Ct. at 2829 (Sotomayor, J., concurring), the "expressive interests implicated by the act" of casting an official vote are likewise modest. Accordingly, it should "by no means [be] necessary for a State to prove that such 'reasonable, nondiscriminatory restrictions' are narrowly tailored to its interests." *Id.* at 2828 (quoting *Anderson*, 460 U.S. at 788).

2. Regulation of Official Conduct Should Not Be Subject to Strict Scrutiny

Even if this Court concludes that voting by elected officials constitutes political speech, regulations on official government action that affect that speech should not be subject to strict scrutiny so long as the regulations are generally applicable, evenhanded

and serve a purpose unrelated to First Amendment values.

This Court has recognized "the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Citizens United*, 130 S. Ct. at 899. Official legislative actions fit within that framework, and can justify regulations aimed at avoiding bias and an appearance of bias in governance. *See U.S. Civil Svc. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."). Such restrictions are justified by the state's legitimate interests in avoiding corruption and the appearance of corruption, and in maintaining an orderly system of government.

This Court's jurisprudence in the areas of electoral regulations and legislative governance is instructive here. As this Court recognized in *Reed*, the electoral context matters in assessing the First Amendment implications of a regulation. States have "significant flexibility in implementing their own voting systems. To the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial latitude to enforce that regulation." *Reed*, 130 S. Ct. at 2818 (citation omitted). Accordingly, this Court has "upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself," *Anderson*, 460 U.S. at

788 n.9, and has "also upheld restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values." *Id.*

Evenhanded electoral regulations that are designed to combat fraud and preserve confidence in representative government can burden First Amendment rights. *Anderson*, 460 U.S. at 787-88. But "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Accordingly, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* at 434 (citing *Anderson*, 460 U.S. at 788).

Indeed, this Court has repeatedly upheld candidacy restrictions that have a much greater effect on public office holders and candidates than the recusal requirement here. For example, states may permissibly enact "resign to run" provisions that require office holders to resign a public position (either elected or non-elected) before running for a different position. *See, e.g., Clements v. Fashing*, 457 U.S. 957, 972 (1982) (discussing cases). *Clements*, in fact, rejected an elected official's First Amendment challenge to both a "resign to run" requirement and a Texas constitutional provision that went even further: it rendered "an officeholder ineligible for the Texas Legis-

lature if his current term of office will not expire until after the legislative term to which he aspires begins." *See id.* at 960, 972. The "burdens" imposed on the First Amendment interests of such candidates were "insignificant," this Court held, and justified by the state's interests in an orderly government process. *Cf. id.* at 972-73 ("Constitutional limitations arise only if . . . the challenged provision significantly impairs interests protected by the First Amendment.").

The state's interest in a recusal statute is similar to that in a "resign to run" candidate requirement: to protect effective government administration while preventing potential corruption or conflicts of interest. *Compare Clements*, 457 U.S. at 968 (plurality section of opinion) (stating that Texas' resign-to-run provision "seeks to ensure that a Justice of the Peace will neither abuse his position nor neglect his duties because of his aspirations for higher office"), *with Carrigan*, 236 P.3d at 623 ("We agree with the Commission that promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest that is consistent with the public policy rationale behind the Nevada Ethics in Government Law.").

The same is true with regulations on acts of government. An elected official's right to cast official votes should carry no greater First Amendment protection than the right of citizens to vote for candidates, or a candidate's right to run for office. If the goal of avoiding a possible conflict of interest permits a state to force an official to step down from an elect-

ed office before running for another elective position, surely the state can prohibit an elected official from voting on measures in which a conflict of interest is present. *See, e.g., Peeper*, 122 F.3d at 622-23 (comparing restriction on board member's participation in proceedings to restriction on candidacy; rejecting strict scrutiny review).

Court cases in the area of legislative governance support the same conclusion. To hold that the act of voting by government officials is the type of expression "that the First Amendment was meant to protect" could open the door to all types of challenges to governing rules by local legislators – and other public officials.[7] The denial of a committee assignment could implicate a legislator's free speech rights, as that legislator may be denied an opportunity to vote on a bill. *See, e.g., Davids v. Akers*, 549 F.2d 120, 123 n.3 (9th Cir. 1977) ("We are unable to understand the suggestion of appellants that failure to appoint a Democrat a member of a committee somehow deprives him of freedom of speech. We cannot accept so extravagant a construction of the guaranty of free-

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[7] Indeed, to hold that official acts by public officials constitute political speech protected by the strict scrutiny standard is to open almost any government action to constitutional scrutiny. As Justice Brennan's dissent in *Spallone* noted, an elected official's free speech argument for refusing to comply with a court order to vote for specific legislation could just as easily be made by a housing official that does not want to issue zoning exemptions or by a trial court judge that does not want to comply with a superior court's mandate. *See Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting).

dom of speech."). Similarly, rules for cutting off debate on a bill may constitute the denial of the opportunity to "speak" on the merits of a bill. *See Parker v. Merlino*, 646 F.2d 848, 855-56 (3rd Cir. 1981); *cf. Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991) (Wisconsin's partial veto provision did not implicate free speech).

Subjecting every such claim to strict scrutiny and the narrow tailoring requirement that accompanies such review would have serious repercussions to the performance of government. Elected officials may voice opposition to a law or measure, but the First Amendment should not be used by government officials as a means to not comply with generally applicable and evenhanded regulations of governance.

CONCLUSION

For the reasons addressed above, *amici* requests this Court to reverse the judgment of the Nevada Supreme Court and clarify that recusal statutes and other generally applicable and evenhanded regulations on acts of governance do not qualify as restrictions on political speech that are subject to strict scrutiny under the First Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Student Press Law Center (the "SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press (AP) is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

The Association of Alternative Newsweeklies (AAN) is a diverse group of 131 alt-weekly news organizations covering every major metropolitan area and other less-populated regions of North America. AAN members have a combined weekly circulation of over 6.5 million as well as a print readership of nearly 17 million active, educated and influential adults in the U.S. and Canada. In addition, AAN-member content is viewed by millions of additional adults via the web and mobile devices.

The Association of Capitol Reporters and Editors was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

Bay Area News Group is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes the San Jose Mercury News, Oakland Trib-

une, Contra Costa Times, Mann Independent Journal, West County Times, Valley Times, East County Times, Tri-Valley Herald, The Daily Review, The Argus, Santa Cruz Sentinel, San Mateo County Times, Vallejo Times Herald, and Vacaville Reporter. These newspapers rely on open government laws, including the federal Freedom of Information Act, to provide vital information to the public about government and corporate activities that affect their lives.

Belo Corp. began as a Texas newspaper company in 1842 and today is a publicly-held television company. Belo owns twenty television stations (nine in the top twenty five United States markets) that reach fourteen percent of United States television households. Belo's media outlets include ABC, CBS, NBC, FOX, and CW network affiliates and its television stations' associated Web sites.

A. H. Belo Corporation is a news and information company that owns and operates three daily newspapers and eleven associated Web sites, with publishing roots that trace to The Galveston Daily News, which began publication in 1842. A. H. Belo publishes The Dallas Morning News (www.dallasnews.com), The Providence Journal (www.projo.com), the oldest major daily newspaper of general circulation and continuous publication in the United States, and The Press-Enterprise (www.pe.com), serving southern California's Inland Empire.

The E.W. Scripps Company is a diverse, 131-year old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's

portfolio of locally-focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, DC-based Scripps Media Center, home of the Scripps Howard News Service.

The First Amendment Coalition is a non-profit public interest organization dedicated to defending free speech, free press, and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that the Coalition resists excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The National Press Photographers Association (NPPA) is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the

United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

The Radio Television Digital News Association (RTDNA) is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Stephens Media LLC, is the publisher of the Las Vegas Review-Journal, the largest daily newspaper in Nevada. Stephens Media also publishes daily newspapers in 7 other states from North Carolina to Hawaii.

APPENDIX B

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